IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, et al, Plaintiffs,

vs.

KROGER, CO., et al, Defendants.

Civil Action No. 1:22-3357

November 8, 2022
3:08 p.m

Washington, DC

TRANSCRIPT OF PRELIMINARY INJUNCTION
BEFORE THE HONORABLE CARL J. NICHOLS
UNITED STATES DISTRICT JUDGE

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*** Proceedings recorded by stenotype shorthand.
*** Transcript produced by computer-aided transcription.

P R O C E E D I N G S

DEPUTY CLERK: Good afternoon, Your Honor. This is Civil Case Year 2022-3357, District of Columbia, et. al., versus Kroger Company, et. al.

Counsel present by telephone for the plaintiffs are Paul Harper, Elizabeth Maxeiner and Paula Gibson.

Counsel present by telephone for the defense is Gabriel Gillette and William Goldstein. All other counsel, please come forward and introduce yourselves for the record, beginning with the plaintiffs.

MR. GITLIN: Good afternoon, Your Honor. My name is Adam Gitlin. I represent the District of Columbia. With me at counsel's table are Elizabeth Arthur, Geoffrey Comber, Will Margrabe, Kathleen Konopka, and Jessie Zweben. I also have the privilege today or representing the states of California and Illinois.

THE COURT: Yes, good afternoon. Will you be taking the lead for plaintiffs today?

MR. GITLIN: I will, Your Honor.

THE COURT: Thank you.

MR. HASSI: Good afternoon, Your Honor. Ted Hassi with Debevoise & Plimpton here in Washington, D.C. With me at counsel table are Steven Ascher of Jenner & Block in New York, Leah Martin with my firm, representing Albertsons. In the second row are my clients, the general counsel, and the

chief litigation counsel of Albertsons.

THE COURT: Good afternoon.

MR. HASSI: Thank you, Your Honor.

MR. WOLF: Good afternoon, Your Honor. Matthew Wolf with Arnold & Porter for Kroger. With me at counsel table is Sonia Pfaffenroth. Thank you.

THE COURT: Good afternoon, everyone.

This is how I plan to proceed today: I've reviewed all of the papers. I've reviewed the briefs, the declarations, including the expert declarations, the merger agreement, the various exhibits that the parties have submitted, so I'm pretty familiar with the written record. I plan to hear from the plaintiffs. Present whatever argument you'd like. I will then hear from the defendants. I will likely give plaintiffs a short time for rebuttal.

At that time I will likely take a brief recess to consider whether I'm in a position to rule on the motion orally today or if I need to take it under advisement. That recess will probably be pretty short, no matter what I do. And then I will either come back and tell you that I am not prepared to rule today or that I am, and I'll give you my ruling.

So I will hear from plaintiffs in one second.

I do want to make one very brief disclosure, and that is that -- I just want to disclose to the plaintiffs

that I am an acquaintance, or friend, depending on how you read the ABA formal opinion 488, of one of the lawyers for one of the defendants, Michael Bernstein, who is a partner at Arnold & Porter. He and I know each other through the golf club, country club we both belong to.

I think we probably count under the Rule as acquaintances, which would not even require the disclosure of the relationship, but for the avoidance of any doubt and because it may very well be that we are friends -- I think we are friends in the most colloquial sense. I'm not so sure about the -- the way that the formal opinion addresses it. I thought everyone should at least know about that.

I certainly don't see any reason that creates a recusal problem, but I wanted to disclose that to the plaintiffs.

So with that, let's hear from plaintiffs, Mr. Gitlin, about why you think I should enjoin the preclosing dividend.

MR. GITLIN: Thank you, Your Honor.

So I understand that the Court has had our reply for only a few business hours, but I also appreciate that you've had the opportunity to read the papers. So I will be brief.

Plaintiffs are seeking a temporary restraining order to enjoin Albertsons from paying a $4 billion special

dividend to its shareholders in connection with its merger agreement with Kroger. I think it is important to note here, because it's been the focus of our briefing, if not defendants', that payment of that dividend together with specific restrictions that the merger agreement places on Albertson's ability to raise capital will reduce Albertsons' ability and incentive to compete now and at least through 2024 when the parties project that the merger will close, assuming it does.

THE COURT: What is the exact agreement that you say that the defendants have entered into?

MR. GITLIN: It's the merger agreement, Your Honor, because the merger agreement incorporates the special dividend and also includes the specific provisions that restrict Albertsons from raising capital for the pendency of the merger review.

THE COURT: If I conclude that -- it seems clear to me -- and I'll hear from the defendants on this -- that the parties have reached a series of agreements regarding Albertsons' ability to engage in certain financial transactions, to include how it might refinance or otherwise -- refinance debt or otherwise raise capital.

If, however, I were to find that they did not reach an agreement to pay the preclosing dividend, would you still have a Section 1 claim?

MR. GITLIN: I think we would, Your Honor, because the agreement can't actually be dismembered. I mean, there's fairly extensive Section 1 precedent on this. We are not talking about challenging the merger under Section 7 at this time. We are talking about an agreement -- and this is a written agreement -- that incorporates the dividend, and it also incorporates the other restrictions, and they work together, because on the one hand they deprive Albertson of the capital it has today. And on the other hand, they restrict it from pursuing capital tomorrow and until the merger closes.

THE COURT: Okay. Is it your position that the payment of the dividend would violate Delaware law? I take it the answer is not, independent of Section 1. Correct?

MR. GITLIN: I've seen no evidence, no authority from the parties that it would. I think it is very telling that they can cite plenty of authority that there's a declared -- once a dividend is declared, there's a right to it, but they cite no authority that says that once a Court orders that a dividend not be paid, that there's some violation of law.

But I think the general proposition stands that you don't get to violate antitrust law simply because you have concerns about a Delaware State law or under numerous antitrust precedents like Indiana Federation of Dentists, a

state policy --

THE COURT: I agree with that, but I think -- this is a different question, really, which is -- at least as it seems to me -- the defendants have taken the position that the dividend complies with Delaware law, together with all of the reasons for, and restrictions on, the payment of dividends like this one. I'm just making sure that the plaintiffs aren't contending otherwise.

That is to say that I -- for purposes of my decision, I have to assume, I think, that the payment of the dividend would, in fact, be consistent with Delaware law.

MR. GITLIN: Your Honor, our claims are under the antitrust laws. We don't take an opinion on whether or not the dividend was properly declared pursuant to all of the provisions of Delaware law.

The point is that they are not a means for circumventing the antitrust laws.

THE COURT: Do you -- do you agree that under Delaware law, now that Albertsons' has announced the dividend, even if it were enjoined by me or the Court in Washington, that Albertsons' would still have a liability of some sort to shareholders?

MR. GITLIN: I don't believe Albertsons' would, Your Honor.

First of all, I don't understand how under a

10(b)(5) case they are actually going to have liability in the sense of anybody being able to prove scienter.

THE COURT: No. I don't think that's the argument. I think your argument to the contrary is missing -- I think their point -- I will ask defendants' lawyer about this.

Their point, as I understand it, is that when you are thinking about Albertsons' future liquidity or ability to raise capital, even if I enter a TRO, they are still going to have some obligation with respect to the dividend. And so even if I entered an injunction, they would still be hampered in their ability to compete in, effectively, the same way that they would be if I don't enter a TRO.

MR. GITLIN: I don't think that's the case, Your Honor.

THE COURT: Why?

MR. GITLIN: Albertsons' today has approximately $4 billion of cash on hand in liquidity that allows it to compete during the pendency of the review.

I don't think that there's that equivalence between how they are today and if you issue an injunction that prevents them from paying the dividend.

What you end up doing is protecting consumers, workers, the State's ability to have an uninfected right to properly review the merger based on the status quo, in the

same way that the premerger notification statute essentially imposes a whole separate obligation on the parties while merger review takes place. That's -- that's what -- that's what you get if you issue an injunction today.

THE COURT: But their point is, that as a -- I think -- I think their point is that as a matter of Delaware law, having now announced the dividend, that they are, as a matter of Delaware law and probably corporate governance or accounting rules, they are required to -- for lack of a better word, I'm going to use the colloquial term, "keep the dividend on their books" as a liability.

And if that's right, if they're right about that, then why doesn't that have the same effect on their ability in the future to compete, raise capital and the like, as if I didn't enter the TRO?

MR. GITLIN: I understand.

I don't -- I don't think, Your Honor, that it's got quite the same effect if you allow them to pay money that they are never getting back versus if there is --

THE COURT: But isn't the point that that $4 billion is essentially incumbered by this liability and while, yes, they haven't paid it out, they are still -- it affects their financial position and has a similar, at least, affect on their ability to compete?

MR. GITLIN: Well, we don't -- we don't accept

that it has -- that it has that affect; that is to say, we don't accept that Albertsons' is going to necessarily have this liability on the books.

So take, for example, the BAX case that they cite. Right? In that case the Court struck a number of the defenses that were raised by the defendant company in the securities litigation. Right?

But one defense that they didn't strike, that the Court did not strike, was whether -- was the defense the dividend had been unlawful declared. Right? Because it turned out for reasons perhaps not knowable to the corporation at the time, that they were declaring a dividend, but that it was unlawful to do so. That's a defense that they can raise with respect to ever having to pay this dividend.

THE COURT: What -- so, obviously, the defendants take the position that the payment of the dividend is a unilateral decision by Albertsons. The only reason that it's addressed in the merger agreement is to ensure that the price paid by Kroger's at closing is net of that dividend payment. It was planned to pay the dividend before there was a merger agreement, and Kroger's has no -- I'm paraphrasing -- no right to control whether and to what extent a dividend payment is made. And if no dividend payment is made, Krogers has no claim

So what's your argument for why the parties have -- or what's your best evidence for why the parties have agreed that there will be a dividend payment of $4 billion?

MR. GITLIN: So the agreement between the parties, Your Honor, is the merger agreement. Right? There are --

THE COURT: Okay. So where does the merger agreement obligate Albertsons to make any -- any preclosing dividend payment, let alone one of a particular amount?

MR. GITLIN: The definition of the preclosing dividend in the merger agreement says how much -- what is the maximum that it can reach, and it's referenced in, I think, 15 different places.

THE COURT: Right. That's so that one knows that Krogers -- excuse me -- Albertsons can't pay more than $4 billion, and it's also a -- it's a defined term, so that when you later look at what the closing payment or the -- basically the transaction price will be, you know that it has to take account of that preclosing dividend.

MR. GITLIN: Yes, but --

THE COURT: Where is there an agreement that Albertsons' must make this dividend payment?

MR. GITLIN: Your Honor, if the question under -- I don't know that there is a place in the merger agreement -- it's pretty long -- I don't know that the merger agreement has a place where it says that -- where it

tells Albertsons the conditions under which it must make the payment.

THE COURT: Is it your position that Albertsons -- that the parties -- put aside the merger agreement. Is it the government's position that the parties agree that Albertsons must pay the dividend?

MR. GITLIN: The parties have negotiated the amount of the dividend. They have negotiated its inclusion into the merger agreement, and the merger agreement contains the dividend and contains other restrictions that applies to Albertsons.

THE COURT: Do you agree that Albertsons is free to not pay the dividend or would have been free to not pay the dividend if it had not made the announcement made?

MR. GITLIN: I don't know about what Albert- -- how Albertsons decided, despite the fact that they started --

THE COURT: I want your -- what is the government's -- is it the government's position that if Albertsons had wanted not to pay the dividend, it could have done so?

In other words, it was Albertsons' decision, and if Albertson would have -- had decided not to pay the dividend, that it would have acted consistent with the parties' agreement or inconsistent with it?

MR. GITLIN: I don't have an opinion on that, Your Honor. It's not --

THE COURT: But isn't that -- isn't that almost fatal to your claim? I mean, I thought your position was the parties had agreed that there would be a dividend payment, and that necessarily means that Albertson is oblig- -- was obligated to make this payment.

MR. GITLIN: Yes. The parties have an agreement. It includes the dividend. It includes the other restrictive provisions, and that -- and our understanding is that, again, antitrust is not looking at the formalities of the contract. It's looking at what is the agreement of the parties and what is its practical --

THE COURT: I agree. I am trying to understand what the agreement was. I totally agree with you that it need not be expressly put in the merger agreement. Parties could have an agreement that's parallel conduct, or it could be an unwritten agreement. I just want to understand in your view what the agreement was about the dividend.

MR. GITLIN: Yes.

THE COURT: Is Albertsons' -- as a result of this agreement, did the parties agree that Albertsons is obligated to pay the dividend or not?

MR. GITLIN: The parties have represented to us that Albertsons is obligated to pay the dividend.

And our position has been, since the beginning, that Albertsons should not, because it would be an antitrust violation to do so. It would be part of an antitrust violation to do so.

THE COURT: Okay. So let's assume there is -- there's an ex- -- just to make it easy, assume that the parties expressly agree that Albertsons would. Put that to the side. Crystal clear from the merger agreement. Albertsons shall pay a $4 billion preclosing dividend.

Defendants have put in their expert report and two declarations from very senior employees saying the theory of injury to competition depends on our inability to compete, because we are going to be illiquid, or we are going to have liquidity problems.

What is your response to that argument?

MR. GITLIN: So our response to that argument is twofold, Your Honor.

So, first of all, obviously, we've presented an expert declaration from Dr. Michael Weisbach. It goes into a fair amount of detail, including on certain analysis, specifically of Albertsons' financial condition that I don't believe has been rebutted or even addressed by -- not by defendant's expert, not by defendant's briefing, and not by any of defendant's executives. It's the last few paragraphs of his declaration. I believe they are 24 to 30. They are

redacted in the public versions of his declaration, so I think as a fact matter, it's -- it's questionable.

And, second, I think they answer a question that we didn't ask and that the antitrust laws don't actually ask, which is not whether or not Albertsons is going to be a going concern or whether Albertsons is going to be in some deep financial distress, but whether or not there is going to be a reduction in its competitiveness pending the review of the merger.

THE COURT: So walk me through your argument for why it will be less competitive.

MR. GITLIN: Sure.

If Albertsons does not have -- Albertsons is now entering a period of economic downturn. Right? Together with the rest of the country, that is. Not one specific to Albertsons.

THE COURT: As is every competitor of Albertsons.

MR. GITLIN: That's -- that's right. The difference between Albertsons and some of its competitors is that some of them have investment-grade ratings on their bonds, so they're going to have an easier time accessing -- accessing capital.

Companies like Albertsons are going to have a harder time accessing capital. That is the reason that companies with non-investment grade ratings on their bonds

hold on to more liquid assets during times of economic downturn when they see those times coming or, in general, because they know that their cost of accessing capital is higher.

Now, you are going to take away all of the money they have on hand to compete. You're going to put in a bunch of restrictions that say they also can't borrow to make up for any of that loss, and now they are going to go into a -- an economic downturn, when increased pressure on margins is going to apply, and they are going to have to compete with others who may invest more in stores, promotional campaigns, service levels, quality of service, the quality of the products they have on their shelves, openings.

Albertsons is not going to have that flexibility, that ability to compete as fully. And this is -- and not only that, but it's not just about Albertsons' ability to compete. The anti-competitive harm is to the market as a whole. There is empirical research. It is discussed in our complaint that -- it is discussed by Dr. Weisbach that specifically looks at how in the retail supermarket industry, when you see one entity become significantly more leveraged, the other competitors realize that it has got a lesser ability to compete, and they soften their competitiveness as well.

THE COURT: Doesn't that -- am I right that that theory turns on the idea that as a result of paying the dividend, Albertsons will have so substantially less access to capital or will be so substantially less liquid that it will affect its ability to compete? And the defendants have put in pretty substantial financial data to suggest that, for example -- your expert ignores the effect of EBITDA and the fact that Albertsons, for example, is supposed to have $75 million in gross revenue, which will spin off cash that will allow it to serve its liquidity needs, as reflected in its financial statements.

MR. GITLIN: So I don't think that the $75 billion figure, in terms of their revenues, is exactly what they have available to cover their liquidity needs in the sense that it's accounted for in liabilities that they also have to cover, Your Honor.

THE COURT: I don't think -- and they are not suggesting they have $75 billion in cash.

MR. GITLIN: Right.

THE COURT: But $75 billion with their current financial situation is expected -- and I think the market expects -- that it will result in not insubstantial net revenue.

MR. GITLIN: Yes, Your Honor, but every year they are operating -- even though they have revenues of on the

order of $70 billion, their actual net operating income is a few billion dollars, you know. And if it was really, really, that they had also, you know, all of these revenues coming in with which they could cover their liquidity needs, why not -- why is it that the special dividend is taking one and a half billion dollars from their revolving credit facility which, you know, accrues at a rate of LIBOR plus up to a point and a half, so I think that's almost 7 percent. That's going to add $100 million a year to their balance sheet. Why are they doing that instead of just, you know, taking from the $75 billion --

THE COURT: Isn't that a question of Delaware corporate law and whether they -- the board should have approved this deal and whether the CFO is doing his job well? Why is it an antitrust question?

MR. GITLIN: Your Honor --

THE COURT: Unless you can prove that that judgment will have anticompetitive effects.

MR. GITLIN: This is not about second-guessing the judgment of this board, except for the fact that perhaps they should not have timed a special dividend of this magnitude that would draw this much liquidity from the company at the same time as a merger.

The question here is whether or not there is a reduction to Albertsons' competitiveness, and that is not

about whether or not they are a going concern. That is not about whether they are in some kind of deep distress or they have to close a whole bunch of stores.

You have to remember that in -- when -- in antitrust law, when we look at how competition can be reduced, we are not looking at whether or not some competitors totally cease to compete. We are looking at whether or not there is a reduction to competition and how that is felt by consumers.

THE COURT: Do you agree that if Albertsons had unilaterally decided to pay the special dividend and there was no merger agreement whatsoever, you would have no antitrust claim?

MR. GITLIN: Um -- if it didn't have the other strictures -- you know, I would need to know a little bit more, obviously, about if there were any other surrounding circumstances, but likely we would not.

THE COURT: Right. So then -- I mean, in a sense, it does -- this obviously does depend on your position that there is an agreement -- an agreement to, among other things, pay the special dividend.

MR. GITLIN: Yes, an agreement that was negotiated between the parties that was announced at the same time as the merger, that Albertsons announced as being in connection with the merger, and that was where the amount, the actual

amount of the dividend, was negotiated between the parties. I don't see how that's not part of the agreement.

THE COURT: But isn't there a difference between being part of an agreement in the sense that it is addressed because it has an affect and actually agreeing on something?

I mean, if, for example, Albertsons took a step two months from now that Krogers viewed as having the effect of negatively affecting the business, such that it triggered one of the covenants in Section VI, would you view that as -- I mean, I don't think in any way would that be viewed as an agreement between the parties for Albertsons to take that step, even though the agreement would address it or have a provision that covers it.

MR. GITLIN: Your Honor, if there was -- if this was just a normal merger agreement, there are, of course, covenants that the parties can include that make sure that they essentially do what we are trying to do here, which is trying to preserve the status quo, make sure that both companies are competing at full steam while the merger review happens.

If that was all that was happening -- I don't have a particular opinion on -- you know, we don't have a view on whether or not a particular term would be enforceable by one against the other. But those are -- those are normal terms.

What is not normal is to have a -- this immediate

drain of all of Albertsons' liquidity at the same time that you impose all of these conditions. At the very least, you would say that if you are going to impose this special cash dividend that is so unusual and that has such an affect on Albertsons' balance sheet, you shouldn't have included the same boilerplate that they include in other merger agreements that says that you have -- that you can't take out any unusual liabilities, you can't take out any unusual indebtedness, and so forth. It's the pairing that creates the antitrust violation.

THE COURT: Why -- why would -- I guess -- let me ask you a different question.

What is the government's -- or the state's and the District's theory about why the parties entered into this agreement, the agreement that you say they entered into? Did they -- because it's a little unclear to me what you think the reason for this -- the dividend is.

Is it your view that the parties entered into this agreement for the purpose of weakening Albertsons' competitiveness position.

MR. GITLIN: Your Honor, this merger was announced on October 13th. We filed our complaint last week. We have tried to get what precomplaint discovery we could from the parties. At this point, you know, we know what we know. But the antitrust laws don't actually decide whether or not

an agreement is permissible or not based on what the parties' intent is --

THE COURT: What as the -- what's the parties' -- putting aside what the actual evidence is, because I totally understand your position, that this is early from a fact-gathering perspective. But what is your theory around the parties' incentives to enter into this agreement?

MR. GITLIN: The incentives --

THE COURT: Because the defendants say the incentives -- you have the incentives all wrong. Krogers has no incentive to buy a substantially weakened Albertsons. And since Albertsons doesn't know if the merger is going to close, it has no incentive to be substantially weakened, because if the transaction doesn't close, then it's substantially weakened.

MR. GITLIN: So I think we laid some of this out in our reply brief, Your Honor, towards the end. I think it is important to remember that we're not alleging that Albertsons goes broke, only that it can't compete as fully, so even if it's extremely weakened --

THE COURT: But that -- I didn't say "broke." I said "substantially weakened."

I mean, your theory --

MR. GITLIN: So --

THE COURT: -- your theory is that Albertsons -- I

assume your theory must be that Albertsons will be a weakened competitor as a result of the payment of special dividend. Correct?

MR. GITLIN: Correct, Your Honor.

THE COURT: And that will have a negative financial consequence to Albertsons, I assume.

MR. GITLIN: I don't -- I don't have --

THE COURT: You think Albertsons will do better?

MR. GITLIN: It's not -- I don't think Albertsons will do better, Your Honor, but it's not about how Albertsons does. It's about how consumers do. Albertsons, if it's faced with --

THE COURT: No, but I'm trying to understand the incentives for Albertsons to enter into the agreement that you are alleging.

MR. GITLIN: Sure. Albertsons is entering an agreement that it gets paid a lot of money to enter. Its private equity owners get to exit the asset. They -- that is for them, if I understand, you know, reports correct, the goal. But that's not actually part of the antitrust analysis.

What matters is the fact that these assets, right, during the pendency of the merger review, are going to be somewhat weakened. Kroger is still going to get them at the end of the day if the merger goes through. And if the

merger does not go through, Kroger still gets a weakened competitor. And regardless, it gets a weakened competitor for the pendency of the merger review, because it's tied the hands of one of its main competitors. Not only that, but it's reserved the right to consult on any refinancing of debt of more than $100 million, which in any other context, I think, would potentially, you know, get you something much closer to per se condemnation.

We usually don't let --

(Speaking simultaneously)

THE COURT: Do you think -- would you be challenging that provision absent the special dividend?

MR. GITLIN: Again, Your Honor, the claim that is before Your Honor is the one that we have brought.

THE COURT: No, so the -- the problem is you have to separate out the exact agreement you are challenging now versus the merger agreement generally, because the merger agreement is subject to merger review. It's not before me. The merger itself is not.

So you have to be very precise, I think, about what it is about the near-term agreement -- what the near-term agreement is that creates the antitrust problem.

And so I understand it's all within the umbrella, in your view, of the merger agreement, but I'm just trying to understand the specific terms of what the parties agree

to. And I take it your view is that they agreed -- they agreed -- I'm not saying it is necessarily in the merger agreement, but that they agreed that Albertsons would or, indeed, was obligated to pay a $4 billion dividend.

MR. GITLIN: Your Honor, their agreement is -- the fact that the merger agreement contains other terms doesn't change the fact that the merger agreement memorializes a dividend that they negotiated, together with other restrictions on Albertsons.

So there is no obligation on plaintiffs to separate out each piece.

THE COURT: Do you those -- do you think that the dividend and those other obligations were essentially negotiated together or were a piece of the same discussion? Or you don't know? Do you have a view?

MR. GITLIN: It doesn't matter. As long as they end up basically being memorialized together in an agreement that the defendants have entered into now, it's an anticompetitive agreement, and it violates Section 1.

When Courts review joint ventures, it doesn't really matter whether or not the parties were cooperating with respect to one thing first or another thing second. The question is, was there a point at which they violated the antitrust laws?

THE COURT: Anything else you would like to add,

Counsel?

As I said, I will give you an opportunity for rebuttal.

MR. GITLIN: The only thing I'd add, Your Honor, because I was rereading the Tribune case -- this is the Department of Justice's 2016 case where they sought temporary restraining order to block a merger on roughly a comparable timeline and obtained it -- is -- with respect to Your Honor's questions about whether or not if Albertsons had done something earlier, if they'd declared the dividend earlier, if there are other circumstances under which there might not be a problem from the perspective of the states, there's a line there that caught my eye, which is, "Tribune evidently anticipated potential antitrust issues long ago because it secured antitrust counsel, yet it appears that it failed to vet intentions with the government voluntarily."

Essentially, the Court goes on to issue the retraining order but saying that, perhaps, the parties could have avoided it.

What we have is what the parties actually decided to do. All right? And the parties decided to make a promise that they agreed on with respect to payment of this dividend in conjunction with other terms that limit Albertsons. That's where we are, and that's why we are here today.

THE COURT: Thank you very much, Counsel.

MR. GITLIN: Thank you.

MR. HASSI: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HASSI: I'm Ted Hassi from Debevoise on behalf of Albertsons.

Albertsons is a Fortune 100 company. It had revenues in the trailing 12 months exceeding $75 billion. It went public in 2020 and has been doing quite well ever since.

If you look at its liquidity over the last three years, it's increased from 3.9 billion to 7.2 billion.

So about a year ago, in November of last year, Albertsons' board looked at that liquidity and said, We should engage in a special review and consider returning some of that capital to our shareholders, because that's how grocery stores, which are slow-growth industry stores, grow, is by promising returns on capital to their shareholders to get shareholders to continue to invest in them.

And so they embarked on a special strategic review starting in November, which they publicly announced in February, and that review culminated in an October 13th board meeting, and the board took two actions. The first action, it voted to merge with Kroger, to sell itself to Kroger, for $34.10 a share.

Second, it voted to approve -- and this was unilateral -- a special dividend of $6.85 per share. So it returned capital in two ways: One, a short-term return with a dividend, which was due to be paid this past --

THE COURT: I understand all of that. So you just used the word "unilateral." But it is the case, is it not, that the parties, meaning Krogers and Albertsons, discussed and, frankly, to some extent agreed upon, at least the maximum amount that the dividend would be. Correct?

MR. HASSI: Your Honor, they absolutely discussed -- they discussed the dividend at their very first meeting, as is clear from the declarations from both CFOs. Albertsons said, Look we are doing this. We are returning capital to our shareholders, so take that into account in the merger agreement.

That's not an agreement. That's, Look, this is something we are going to do --

THE COURT: Didn't Kroger's have input and, in fact, pushed back on the amount of the dividend, because it was obviously an interested party, because the amount of the dividend would affect the value of Albertsons post-closing.

MR. HASSI: Your Honor, as the record reflect, there were times where Kroger indicated that if Albertsons was going to issue a dividend, that it would prefer that that dividend be lower.

But at the end of the day, the amount of the dividend was Albertsons' decision, and there is no evidence to the contrary that the decision to pay the dividend was Albertsons and Albertsons alone.

And the plaintiff states recognize that in the papers they filed last night. If you look on Page 4 of their brief, they use the word "may." "Albertsons may pay the dividend," because that's what the agreement reflects.

You've got an agreement. It's over 100 pages long. It's a written agreement. We don't deny that there is a merger agreement between these two parties.

THE COURT: Your point is -- and I was asking plaintiffs' counsel questions about this -- your point is Albertsons was never obligated to Kroger in any way, shape or form, to pay the dividend, or to pay a particular amount of the dividend. And when it decided to do so, it did so unilaterally.

MR. HASSI: That's correct, Your Honor.

THE COURT: But the plaintiffs say, um, hold on. There are -- first of all, the merger agreement does include, in Section VI, some things that are clearly agreements between the parties that restrict Albertsons' ability to engage in certain financial transactions post-signing, and the facts surrounding the negotiations, the press release, the timing and the like, are enough to

conclude that there is, in fact, an agreement between the parties that the dividend would be paid.

And why isn't that enough to at least get them over the hurdle on whether there's an agreement for Section 1 purposes?

MR. HASSI: For a couple reasons, Your Honor. First of all, there are several -- there are several agreements here that plaintiffs talk about in their papers, and they really -- they really conflate the three.

There is an overall merger. Right? In their papers when they start talking about the Harris Teeters and the Safeway in Adams Morgan, that has to do with a merger that's not before Your Honor today. And I think Your Honor has indicated you recognize that.

Second, there is a merger agreement. It's a written document. It's got four corners to it. And, yes, it refers to the dividend, and I am happy to walk through the provisions that refer to the dividend.

Third, they try and conflate the unilateral decision to issue a dividend, because what the merger agreement says, it's permissive. "May issue a dividend," and it does have a cap in the agreement on how much of that dividend, if -- if Albertsons exceeded that cap, Kroger has the right to walk away from the merger.

So, yes, there is a cap. But that doesn't mean

there is an agreement to pay a dividend. It doesn't mean there is an agreement to pay off $4 billion agreement dividend, and it certainly doesn't mean that there was an agreement between these two companies to harm Albertsons during the pendency of the merger.

And that's the unlawful agreement that the plaintiffs are indicating here. They claim there is an unlawful agreement. Not just an agreement, but an unlawful agreement, between these two companies to damage Albertsons, pending a merger review.

THE COURT: Well, I think -- I think they say two things. I think they say there's an agreement between the parties to pay the dividend. The payment of the dividend will have certain affects that are anti-competitive; that's enough.

And I think alternatively -- and I don't mean to put words in their mouth, but I think alternatively they say, the point of the -- of that deal or the agreement was -- and maybe you would say this is an addendum to it, is to -- is to weaken Albertsons.

But I'm not sure that they -- I don't think their theory is dependent -- or at least as it has been articulated in my view -- on that last piece, that the purpose of the agreement had to be to weaken Albertsons.

I believe their theory is, they agreed on this

thing. This thing will harm competition, because it weakens Albertsons. Full stop. We win.

MR. HASSI: Your Honor, we have a written agreement here. Right? And so let's -- let's talk about evidence for a minute, because as a matter of antitrust law, you can have direct evidence or you can have circumstantial evidence. No question, the merger agreement, direct evidence of an agreement, and it says what it says, and it's permissive as to the dividend.

So what they want to do is bootstrap from that written agreement to an unlawful agreement. And that agreement is lawful, and we can talk about the ordinary course covenants and the restrictions that are placed on parties every day in merger agreements so that the buyer is protected from the seller taking actions outside of the ordinary course. That's ancillary to the merger agreement and should be viewed in the context of the entire --

THE COURT: I do want to put a placeholder down. I don't want to have you do it right now.

I would like you to take me through some of those covenants in Section 5 and just where they line up with, for example, Professor Smith's views about the availability of sources of liquidity and whether and to what extent those covenants impact those sources of liquidity. But I don't want you to do it yet. I'd like you to keep going.

MR. HASSI: I would be pleased to do that, Your Honor.

But I was saying in judging the evidence with respect to the merger, with respect to direct evidence, you look at that direct evidence. You look at the merger agreement.

With respect to the circumstantial evidence, you ask the type of questions Your Honor was asking. What's the motive -- if we are saying that we can infer from a press release that says, In connection with the merger -- and let's face it, if you are going to tell the public about a dividend and a merger on the same day, and the merger price is affected by the dividend, you want to make sure that the public connects the two for transparency sake.

THE COURT: You might even be obligated to. I don't know.

MR. HASSI: You might -- and I'm not a secure -- I'm an antitrust lawyer.

THE COURT: I'm not either.

MR. HASSI: Not a securities lawyer, Your Honor. There are some good ones in the house back at Jenner helping us.

But you cannot infer from that -- and that's what they are asking you to do -- is to infer that there is an agreement; that there was a conscious commitment to a common

scheme, not to enter into a merger agreement because then we're back to the direct evidence, but a conscious commitment to a common scheme to enter into an unlawful agreement. So not the merger agreement, which is lawful, but an unlawful agreement.

What makes it unlawful? If its purpose or effect is to damage competition; i.e., to damage Albertsons.

So what they are saying is -- and this is where, as I said, they are conflating at least those two agreements and sometimes pulling the merger into it as well in talking about the stores and Adams Morgan, but they are conflating those to try and suggest that there is this agreement to -- and they said it in their papers -- to weaken Albertsons in such a way that -- and this is in their Complaint -- that it would qualify for the failing firm defense.

Now, when we saw that, I will tell you, we emailed the plaintiff states and said there is no failing firm defense here. We are never going to be insolvent. We are not going to claim that. We would like to take that off the table. But unfortunately didn't resolve -- resolve things, and here we are today.

But you have the CFO whose declared this company is not going to be -- not going to be insolvent. And that was not -- my point is, that was not the purpose or intent of this agreement, and it won't be the effect of this

agreement, and we shouldn't take that circumstantial evidence of the press release, of the timing of these two, which part of a single, singular strategic review, and the culmination of a singular strategic review; the fact that they were announced at the same time, that should not convince Your Honor that, therefore, they are tied together in such a way as to be illegal and unlawful.

The dividend, standing on its own, and -- you know, I'm sorry that the states can't commit to this, but had we announced the dividend standing on its own, there's never been a challenge to a dividend, under antitrust law, that I am aware of.

THE COURT: I'm not aware of one either.

MR. HASSI: And I think if we'd announced the dividend four days earlier, we wouldn't be here -- we wouldn't be here today. But the fact was, this is the way words operate. They did the strategic review. They evaluated how to return capital. And, candidly, we didn't know until last minute whether this merger agreement was going to be signed or not.

So they were announced at the same -- they were announced at the same time, but one shouldn't draw conclusions from that that are anything other than what is obvious. The board got together, the board took two votes, two unanimous votes; one to approve the dividend, and one to

approve the merger agreement.

THE COURT: Do you agree -- put the question of an agreement to the side, but if we are just talking about Albertsons' ability to compete in the future, that if Albertsons and Krogers had, in fact, reached an agreement to pay a dividend, that there is a dividend amount that would be so substantial that it could have the affect of lessening Albertsons' ability to compete?

In other words, if they agreed to pay a dividend -- if the parties agreed that Albertsons would pay a dividend of $25 billion -- or pick your number; that that would be such a substantial amount that Albertsons actually would be significantly hamstrung in its ability to compete.

Do you agree with that?

MR. HASSI: Assuming there were -- assuming there were an agreement and a board dumb enough to agree to that, there's a number.

THE COURT: Exactly.

I understand from your perspective I've assumed away a lot. But if we just isolate that question, then, the issue is, from your perspective, whether the $4 billion dividend is substantial enough to have the affect on Albertsons that would then have the affect on competition. And your view, of course, is that it's not substantial enough.

MR. HASSI: That's correct, Your Honor.

THE COURT: So walk me through that and the numbers. And then -- not the numbers, but the sources that Albertsons has or might have to remain competitive at the level you think it should remain.

And as you do that, if you could, if you could just sort of note places where the merger agreement and the -- the agreement, or the limitations on Albertsons, might kick in.

MR. HASSI: I will, Your Honor.

Does Your Honor have a copy of the slides that we --

THE COURT: I do, yes.

MR. HASSI: These are -- they are excerpts -- they're largely excerpts from documents, but it may be helpful -- and these are -- some of these are under seal. That's why we wanted to do it this way.

THE COURT: Yeah, we will do our best to not -- I won't say anything that is clearly sealed. I assume the plaintiffs have copies?

MR. HASSI: They do, Your Honor, yes.

THE COURT: Thank you.

MR. HASSI: If you look at the first slide, and it's entitled "Albertsons has access to sufficient liquidity to pay the special dividend."

What this is is a graphical representation of its liquidity over the last several years. And as I said at the outset, and as it says at the top here, Liquidity has increased from 3.9 billion to 7.2 billion.

So in dark blue you have cash and cash equivalence increasing year over year, and above that you have the ABL. And the ABL -- I think it increases a little bit, but basically they don't draw down on the ABL, and their cash and cash equivalents are increasing.

And for the record, this is part of the reason that Albertsons sat out on a strategic review to pay this dividend is they have cash on their -- they have cash on their books that they are not using.

THE COURT: As a general proposition, shareholders don't love when the company they own sit on cash. I mean, I understand there are times when they want to, but shareholders do like cash returned to them.

MR. HASSI: Right.

THE COURT: At times.

MR. HASSI: So as part of the special review, the strategic review, the company thought there are ways to -- there are ways to return this cash. Tender offer, buy-back shares. That was considered.

As I mentioned, if you go to the second slide, this just goes to the agreement issue which we've already

talked about, but just to emphasize it, this second slide is -- um, was prepared for Kroger's board after the first conversation.

And if you look at it, it says in the middle bullet: "Following discussion with Acorn's advisors" -- Acorn is Albertsons' -- "Acorn is currently contemplating the following options with a plan to announce by earnings in mid to late July." Back then we thought the merger might get done this summer.

"Number one, issue a special dividend (financed via debt and cash on hand)." That's what they are doing now. "And, (underlined) considering one, alongside two or three, raise third-party equity or a potential merger with Kettle."

And my point is -- and Kettle is, as you might imagine, Krogers.

So the point is, at this point in time, we were clear -- Albertsons was clear -- we are going to do -- we're going to do a return. We may do a merger. We may do both. Those are -- those are all our options.

But if you flip now -- and so if you flip now to -- there's a slide with a bunch of numbers, projected cash flow and balance sheet. It has the page number 6, but these aren't -- because they are excerpts -- not numbered consecutively.

That's from roughly that same period of time. This is from -- I believe it is a June 10th document that was presented to the Albertsons' board. And they were considering -- as was indicated in their prior document, and as they told Kroger at the outset, they were considering returning cash to shareholders. At the time they were considering a tender offer, because that's a better way -- that is a better way to do it at that point in time than a dividend.

You can't do a tender offer while you're doing a public company merger, because there are securities law issues that could arise with respect to inside information related to the merger, as I understand it. Again, I am an antitrust lawyer, not a securities lawyer.

But this was vetted by company management, reviewed and prepared by the bankers, and then presented to the board. And if you look at this, it reflects -- so this is a distribution of 4.5 billion, so a half a billion more than the special dividend we are talking about today.

If you go to the bottom of the page, if you look at ending cash -- so at the end of 2022, they estimate that they will have cash on the books of a half a billion after paying the dividend. And that's what they will -- what they would have today had they paid the dividend out on Monday.

That ending cash goes up year, over year, over

year, and that's because -- and this is the central issue that plaintiffs and their experts missed; and that is -- I talk about this as being a $75 billion business, because as Your Honor recognized, it throws off a certain amount of cash. Not all of that $75 billion is available to the company, but based on its past record, what you see in the last several years is, the company has invested in itself. It has paid its workers. It has redone its stores. It has competed fiercely with not just Kroger, but everybody out there: Walmart, Amazon, everybody.

And it has gained excess cash on its books. It expects to do that in the future, even after paying this dividend. And that's what this document shows. It shows cash going up. Just below that, total debt going down. And at the bottom, net debt decreases year, over year, over year. And the company's leverage gets better as time goes on.

So when the plaintiff states talk about going to the debt markets and borrowing to pay the dividend, there's no borrowing necessary. This company is not expecting to go to the debt markets. This company doesn't need to go to the debt markets because it's doing quite well.

Now, they may choose, as a matter of corporate finance, to go to the debt markets. But the point is they don't have to.

And the CFO has tried to say that seven different ways from Sunday in her declaration. I mean, the company has a three-year plan. That plan is not changing one iota as a result of this dividend. They will continue to pay their workers. They will continue to invest in stores, and they will continue to compete. They just returned some cash to the shareholders, as they are entitled to do under Delaware law.

And your Honor asked the question. The company ran the Delaware corporate law analysis under Delaware General Corporate Law, Section 170. It ran it two different ways, and it found it had surplus cash that, as a matter of law, as a Delaware corporation, it was entitled to return to its shareholders.

And that's what the plaintiff states are asking you to invade. And they are asking you to invade that based on some concern about the future. That concern, by the way, hangs on a recession. And as Your Honor knows, during recession, we all still eat. We all still go to grocery stores. And there is not one wit of evidence in their papers about how grocery stores perform during a recession. They actually do pretty well, because we all still eat.

We might get rid of the discretionary spending. We might not go out to restaurants, but we're still buying our Cheerios in the morning. So this idea that a recession

is -- winter is coming and that they're going to need to borrow, that's not what the company expects.

So you asked about the merger agreement and Section 6.1 --

THE COURT: Yes.

MR. HASSI: -- which is those covenants, and if you'll give me a second, I will try to find them in my papers.

I'm going to refer to the -- I appreciate the plaintiffs putting in the full-text version, which my eyes can deal a little bit better with -- Section 6.1, which in the Plaintiffs' version is on Page 59.

THE COURT: Yes.

MR. HASSI: These are ordinary course covenants. These are entered into -- I see a lot of merger agreements in my work. I see these all the time. We, as antitrust lawyers, check them to make sure that they're not -- there is not gun-jumping here; that they are not allowing the buyer to control the seller. But the buyer has a right to make sure that the seller is going to operate in the ordinary course, and if you are going to go outside the ordinary course.

For example, going to the debt markets to take on a bunch of debt. Right? Kroger doesn't want to buy a debt-laden company. It wants to buy a company that's got a

nicely, not too levered balance sheet.

And by the way, Kroger guides to a 2.5X net EBITDA-to-debt ratio. This company, after the payment of the dividends -- excuse me, Albertsons, after the payment of the dividend, will be at 1.9.

It had several years ago been much, much higher. It's been going down, down, down. They've been taking debt down even as the cash has been going up. So both things have been happening at the same time in recent years.

But back to the covenants.

So section 6.1 talks about the conduct of the company, and it says you have to operate in the ordinary course. And if you are going to operate outside of one of these covenants -- and this is the last part of Section 6.1 before you get to 6.1(a). There is a Roman numeral VII. And it says, "With the prior written consent of parent (that's Kroger) which consent will not be unreasonably withheld, conditioned, or delayed."

So if the company has to go to the debt markets, and we'll talk about that provision in just a second, and they want to borrow -- and this -- sorry. I should just go there.

It's, um, it's on Page 62 is 6.1(n), and it talks about a restriction on the company refinancing -- entering into definitive agreements for any such refining

indebtedness that is in a principal amount exceeding $100 million. So if the company wants to go to the debt markets for more than $100 million, they have got to go to Kroger first. Yes. Now, Kroger can give its prior written consent, and it can't unreasonably withhold that consent.

So this is not a be-all and end-all constraint; you can't do it. It's, simply put, before you go loading the company down with debt -- because Kroger's doesn't want -- it wants a financially vibrant company. It's not buying Albertsons to be a rundown supermarket chain. It's buying a crown jewel set of supermarkets.

And so we have the right, with their consent, to go to the debt markets should it be necessary. But again, I want to stress this point, the company doesn't plan on doing that, and its ordinary course documents show that.

It generates free cash flow, enough to pay its ongoing responsibilities, including those in its three-year plan and doesn't need additional cash such that it expects going to the markets.

I don't know if Your Honor has other questions about 6.1. I'm happy to --

THE COURT: I have one question. I was trying to find the precise terminology for it, but, um, the provision you were just talking about, the $100 million provision in N, does that have anything to do with the -- and again, I've

forgotten the name of it -- but the debt vehicle, for lack of a better word, from which Albertsons intends to fund part of the special dividend?

MR. HASSI: No. The ABL is the --

THE COURT: Yes. Sorry.

MR. HASSI: -- term you are thinking of Your Honor.

THE COURT: Yes.

MR. HASSI: No, the ABL is a line of credit. It's actually considered part of the company's liquidity. Companies -- there's actually a slide on this.

THE COURT: Right. I thought that was right. I just wanted to make sure. So the ABL is -- is it fair to say, is presently unaffected at all by the provisions in 6.1(n) or is it affected if, for example, Albertsons wanted to refinance it, for lack of a better word?

MR. HASSI: My understanding -- and I'll want to get back to Your Honor on this with -- talk to a corporate lawyer and just confirm my understanding is correct -- is that the company has the right under the merger agreement to use the ABL. That's an assumed -- an assumed right, and they are using that ABL, 1.5 -- 4 billion of the ABL to help pay the dividend, assuming we get a chance to pay the dividend.

But it's basically -- the way I think of it is is

a line of credit, Your Honor. It's a floating line of credit which the company can use and can pay back, and it doesn't have the same defined debt terms that you see, you know, in a longer-term bond.

My understanding is this provision we've been talking about, N, is that sort of a longer-term lending vehicle going to the bond markets, in other words, Your Honor.

THE COURT: Thank you.

So one question I have is, if -- and I could have asked plaintiffs this, but I think, you know, they are not in that case. But can you just bring me up to speed -- I get this is really not a substantive question; it's a relationship question -- with what is exactly happening in Washington.

Obviously, I saw the -- the order from the Court. Are the parties still set to have a -- in Washington, a preliminary injunction hearing on Thursday?

MR. HASSI: I'm not sure, Your Honor. The State of Washington, as we were heading over to this court house, asked for a meet and confer because they want to call witnesses in that case.

That matter was set for 3:00 on Thursday afternoon. We know from our prior experience that the King County Courthouse closes pretty religiously not long after

4:00. In fact, we were worried about the lights going out because our last hearing went past 4:00. If there were going to be witnesses, I -- it may get -- it may get pushed to another date. They wanted -- they wanted -- and I think they are meeting and conferring as we speak.

So I don't know -- and we'll provide Your Honor with the -- we'll let the -- we won't do it ex parte. We will let the plaintiffs know, we'll provide Your Honor with an update as we have it.

But at present time, we expect to be before Judge Schubert 3:00 on Thursday for a PI hearing. It's this witness piece that is throwing me a little bit for a loop in terms of predicting whether that's going to happen or not.

THE COURT: But whether it's Thursday or some other day, the status quo in Washington is, there is a restraining order against payment of the dividend, and that has affect, and it still does, and that unless and until that is converted into a PI or expires, I suppose, the companies are -- or Albertsons is precluded from paying the dividend.

MR. HASSI: Yes, Your Honor. And maybe just a couple of words about that.

One, as a matter of state court procedure in the State of Washington, we were before -- we were in the ex parte part for the hearing. We were not before the same

judge. We were before a judge who, as I understand it, ordinarily hears probate cases. You know, these things get picked up by the judge who is available as a result of the emergency.

And, you know -- and, again, this was my understanding of what happened. It was pretty clear he was making an effort to maintain the status quo until we could get in front of Judge Schubert.

I want to be clear, as I think Your Honor picked up, based on your questioning to Mr. Gitlin, the status quo has harmed the company. The company does have a liability on its books because we made a promise to our shareholders, the shareholders of record as of the 24th of October are entitled to be paid that dividend of $4 billion.

We've been hearing from those shareholders, as you might imagine. Not happy. Some of these are -- you know, it's a publicly-traded company. There are millions of shares. They float out there. They are the real ones that are being injured by that. They are people that bought shares with the expectation of getting a $6.80 dividend on Monday, and they don't have their money.

And the reason -- you know, the company has -- that liability is sitting on the company's books. If we did have to go to the debt markets, Your Honor is exactly right. It's out there. It is -- the company has to reserve against

that, because it -- as a matter of Delaware law, there is an expectation that will pay that.

I am not saying that Mr. Gitlin is wrong that if we get sued in Delaware Court, that we won't raise an injunction as a defense. We will raise every defense we can think of, and we'll do our best. But as a matter of Delaware corporate law, made a promise to our shareholders. The date for keeping that promise has passed.

THE COURT: And not to get into the weeds on accounting or the like, but at least for present purposes, even now, with an injunction from Washington State, I assume your position is that Albertsons is treating the statement that it would pay the dividend as having created a liability presently --

MR. HASSI: Well --

THE COURT: -- is what I do. But that same would be true for me. If I were to enter a TRO, you would -- it would be the promise to pay the dividend, or the statement to pay the dividend, would create, on it books at least for Albertsons, a liability, and that would have an effect -- I'm not sure that we've really figured out what the effect would be exactly, but it would have some effect on Albertsons' liquidity, I would expect.

MR. HASSI: I would expect the same, Your Honor. And, again, antitrust lawyer --

THE COURT: It may not be as -- it may not be as significant as the payment of the dividend, but I -- it seems to me it would be more than a zero effect.

MR. HASSI: That is my understanding, Your Honor, yes.

THE COURT: Is there anything else you would like to add?

I expect that counsel for Kroger's would like to speak and, of course, I want to give plaintiffs an opportunity to rebut.

MR. HASSI: Unless Your Honor has further questions.

THE COURT: I don't. Thank you very much.

MR. HASSI: Thank you.

MR. WOLF: Thank you, Your Honor. And I will be very brief.

My client has been accused of committing an antitrust violation. From day one, Albertsons told my client that they were strongly considering issuing a dividend. We were told that immediately, candidly, openly.

Our response was twofold. We said, if you issue such a special dividend then, of course, that will affect the purchase price we are willing to pay.

And secondly, if you go over a certain threshold, then we are going to reserve the rights to walk away from

the deal. Those two if-then statements worked their way into the merger agreement.

That is not an agreement to issue a dividend. That was not our request that they issue a dividend. That was not our demand that they issue a dividend, and it certainly wasn't an agreement.

Absent an agreement, there cannot be an unlawful agreement. So substantively, there was no agreement. At all times, Albertsons was in control of the decision-making regarding the dividend. When? Where? How much? If?

Now, one other procedural point, Your Honor, and then I'll let counsel rebut. It's a procedural point, but it's an important one. The -- and, of course, we are here under extraordinary circumstances. A TRO, by definition, is an extraordinary request.

Plaintiffs needed to lay out the basis for their assertion that my client and Albertsons had committed an antitrust violation. And their allegations, as laid out in their TRO papers and, for example, we can look to the operative titles of the sections. In its opening brief, at Page 7, "The special dividend Violates Section 1."

Under that title, we hear what the purported violation was. They summarize that unlawful conduct as, "Defendants' horizontal agreement for Albertsons to issue the dividend." That's at Page 7 of the TRO.

Now, in our respective oppositions, we pointed out the fundamental flaw with that theory, and I just addressed that in the opening remarks, Your Honor. The authority to pay the preclosing dividend rested solely with Albertsons at all times, and that the merger agreement does not require Albertsons to pay.

If they had chosen not to pay the dividend, that was fine. That was their entitlement. That is the state of affairs, as it always was and it always be will.

When we made those arguments, we saw a not-so-subtle shift in the theory of plaintiffs' case.

The commensurate title to the opening brief, which you'll recall was "The special dividend violates Section 1," in commensurate title in the reply was "Defendants merger agreement restrains competition to the special dividend and related terms."

And frankly, we heard counsel this morning go to that almost immediately. These -- as he called it, boilerplate -- and he's right. These boilerplate merger terms, that he says somehow they create a penumbra or they work hand-in-glove. I'm still not sure how this is supposed to work, but somehow it's the special extra terms that are admittedly boilerplate that turns a non-agreement into an agreement that turns a dividend into an antitrust violation.

Your Honor, if they believe that these additional

terms were somehow important to their allegation, they should have made it in their TRO papers.

Instead, the only reference to these additional terms was in a single paragraph where they say -- they somehow exacerbate the effects of the purportedly violative dividend.

Your Honor, my client did not, has not, committed an antitrust violation, nor has Mr. Hassi's, and therefore the rest of the discussion of the TRO is unnecessary.

Thank you for your time.

THE COURT: Let me just confirm one thing.

MR. WOLF: Yes, of course.

THE COURT: And you basically said it, but --

MR. WOLF: Yes, Your Honor.

THE COURT: -- your position is -- Krogers' position is, Albertsons is free and Krogers has no claim against it if it pays no dividend whatsoever or if it pays a dividend of an amount between $1 and $4 billion?

MR. WOLF: That's exactly right, Your Honor.

THE COURT: And if and only if the dividend is more than $4 billion does Krogers have any rights whatsoever with respect to the dividend. And if it goes above $4 billion, Krogers has the option of walking away.

Of course, if the amount is $4 billion or less, that affects the purchase price. Right?

MR. WOLF: Correct, Your Honor. That's exactly right.

THE COURT: But Kroger's, in your view, has no right to obligate Albertsons to make a payment at all.

MR. WOLF: That's right. That's in their business judgment what makes sense for their business to do.

THE COURT: Okay. Thank you, Counsel.

MR. WOLF: Thank you, Your Honor.

MR. GITLIN: Thank you, Your Honor.

I will start with Mr. Wolf's last points, because I think defendants are in a tough spot having essentially waived whether or not we are likely to succeed --

THE COURT: No. Wait a second. You put that -- I wouldn't even attempt to make that argument, because you have, at best, an oblique reference to those other provisions in the merger agreement in one paragraph in your motion.

I didn't think that you were arguing that the provisions in Section 6 were somehow part of the unlawful agreement here. And I think it was quite reasonable for defendants not to focus on that --

MR. GITLIN: Your Honor --

THE COURT: -- so I do not think your waiver argument goes anywhere.

MR. GITLIN: Your Honor, the temporary restraining

order, respectfully, is to block the payment of the dividend.

I don't need to block the merger from going through at this juncture. Right?

So we seek the temporary restraining order with respect to payment of the dividend, but we made clear in our opening motion -- this is Pages 9 to 10 of the brief. We make clear in our complaint that these provisions work together. And I can refer the Court by turning to the complaint.

THE COURT: I understand your point, but I am not going to hold that the defendants waived their response about Section 6 because you put it in a paragraph obliquely and they didn't respond to it.

So I wouldn't take more time.

MR. GITLIN: Understood, Your Honor.

My -- I do think it's important to make clear what plaintiffs' theory of harm is here, because from what I heard from your discussion with Mr. Hassi, I think some clarification is in order, so --

THE COURT: Can we just stay on the agreement for a second?

MR. GITLIN: Sure, Your Honor.

THE COURT: That's why I ask these questions at the very beginning.

Plaintiffs -- the current challenge, plaintiffs' position is that the defendants agreed to have a special dividend of $4 billion paid by Albertsons, and to restrict Albertsons' ability to raise capital, as restricted through Section 6.1(n). Correct?

MR. GITLIN: That's correct, Your Honor. Albertsons announced this dividend on the same day as the merger. Kroger acquiesced to the amount of the dividend after the two negotiated the agreement, and the agreement contains both the restrictions and the dividend.

We are agnostic in our complaint as to the -- whether there was a specific purpose to weaken Albertsons as a competitor. I think the portion of the introduction that Mr. Hassi is referring to is where we say the discovery may reveal that the special dividend reflects a calculated effort to leave Albertsons in --

THE COURT: I take it your theory -- I think the theory is a perfectly legitimate one, which is -- I mean, whether it is supported by the evidence in another Court, but I think the theory is a legitimate one, which is the parties agreed to pay a special dividend and have these restrictions.

Doing so will have the effect of substantially or whatever -- use whatever adverb you want -- of weakening Albertsons and thereby harming competition. That's an

antitrust violation.

MR. GITLIN: That's correct, Your Honor.

I think there are a couple of other points I'd like to address.

So, you know, at the moment, it's not -- it's not the case that there is some conclusion that's been reached with respect to the merger agreement. So I heard counsel say that, well, that there's -- that the merger agreement itself as a broader matter, is perfectly lawful. That's not -- we are not taking a position one way or another on that.

THE COURT: And I am not either, or would not be.

MR. GITLIN: I want to highlight again that the Delaware law, whatever -- whatever the case may be in this instance, whatever their obligations, this is a harm to the extent that Albertsons thinks it's suffering a harm, it is of their own making. It's not just that they can't get around antitrust laws; it's that they knew that -- they consciously decided to time this dividend with the merger -- with announcing the merger, because the two were part of the same agreement.

And then I just want to go back to some of your discussion with Mr. Hassi and the deck that defendants provided.

But the first thing is something I heard that,

frankly, didn't make sense to me, given what I understood to be defendants' argument. My understanding of defendants' argument is that paying $4 billion, even though 1 and a half billion of it is borrowed from the revolving credit facility; but, in general, is not going to have an impact -- any discernible impact on Albertsons' business, on Albertsons' competitiveness. Nothing.

So when Your Honor asked whether or not there would be an impact, a liquidity impact, in some way if you granted the TRO and essentially this money was -- even though it's a liability that's on the books, it was unavailable to them, Mr. Hassi said there would be some impact.

I think you said it wouldn't be quite -- it may not be very great, but there would be an impact. I don't understand how the $4 billion, when it gets paid to the shareholders, has no impact on their balance sheet, but when it gets sequestered, essentially, by virtue of Court order, it does have an impact and therefore harms them.

Let me turn to Slide 2 of their presentation.

One thing that is clear is that for whatever reason, and whatever its function, the ABL facility has never been used by Albertsons in the last few years. It's set at a certain amount, and it's never been tapped.

If they really have no liquidity concerns, why is

one and a half of the $4 billion that they are going to use to pay the special dividend, coming from this -- why is it coming at a time when it is going to add to their balance sheet? Why -- if we go on and look at the options that they were considering, on Page 3 and the fact that they were considering a variety of options. And I think Mr. Hassi discussed that they had a tender offer. Why did they consider -- why did they not continue the discussions of the tender offer? Why is it that the agreement without -- with Kroger results in a different path?

The way we have understood the sequencing here, they reached an agreement with Kroger, and part of the agreement is paying the special dividend in lieu of other options, and that is negotiated with Kroger.

I think that is all I had with respect to -- with respect to their presentation, Your Honor.

THE COURT: Let me just ask this question. So take a look at -- I guess it's Deck Slide 2. That reflects over $7 billion of liquidity.

Do you dispute that that's an accurate reflection of Albertsons' current financial position?

MR. GITLIN: Your Honor, I saw this today, like you did. My understanding is that they have, yes, several billion dollars today, before they pay the dividend, of cash. Right? So this is not reflecting a post-dividend

world. Right? They have several billion dollars today of cash that reflects their current liquidity, and they have certain access to the ABL at an interest rate that, you know, is a function -- is a market rate. It's not like Ms. McCollam's declaration says with respect to most of their other debts where it is fixed. This is actually market-determined. As I understand it, it's LIBOR plus some certain amount. And that for whatever reason, as much as they've considered it cash before, they haven't accessed it previously.

THE COURT: But that amount, which you have no reason to dispute or doubt, is almost double the dividend. And even if the dividend is paid, still leaves 3.15 billion in liquidity if nothing else changes.

MR. GITLIN: That's --

THE COURT: And then -- and then, if you take a look at -- I guess it's this slide deck 6. Now, granted, these are -- these are projections, but do you have any reason to believe that these projections were cooked up or were not the company's or Credit Suisse and Goldman's best estimates at the time of the future cash positions of Albertsons even after a distribution that, as reflected here, was going to be $500 million more than the current distribution is contemplated to be?

In other words, are you disputing in any way that

this was the company's and its advisor's best estimate of its future financial positions?

MR. GITLIN: Your Honor, we have not had the chance to interrogate any of this. But even if it were true, right, what is also true is that Albertsons projects $6 billion in needs for liquidity over the course of the year. Right?

And the cash that they generate in the form of revenues cannot be used for additional store improvements, worker salaries and the like that they need to do if they are going to compete -- if they need to respond to competition.

THE COURT: Do you have a position on what a reasonable dividend would have been to pay?

MR. GITLIN: I don't need to have one, Your Honor. All I need -- in fact, I don't even need to have a position on what a reasonable net debt ratio is relative to other companies.

What matters is how Albertsons is doing today versus how Albertsons is doing if it pays the dividend, particularly when it's an amount that is consummate with the amount of cash it has on hand.

THE COURT: Won't its net debt ratio be better than many competitors, even after payment of the distribution?

MR. GITLIN: Again, Your Honor, it doesn't matter with --

THE COURT: No, it's just a question. My question is, is that true?

MR. GITLIN: I think it depends what you -- what you mean. I've seen their analysis that with respect to --

THE COURT: Do you have a different one?

MR. GITLIN: -- with respect to other companies, that, you know, it depends how you define "competitor" but with respect to certain other companies, it may be comparable.

But again, what matters is that Albertsons' executives have decided, have made decisions that led it to the point today where it can be competitive with the $4 billion it has in cash on hand. And what it's going to have tomorrow is $4 billion less in a year that it anticipates needing $6 billion and in a year that it's going to have trouble accessing capital.

THE COURT: Thank you, Counsel.

Anything else from the defendants?

MR. HASSI: Not unless Your Honor has questions about the 4 billion or any of that, but --

MR. WOLF: Nothing else, Your Honor.

THE COURT: Okay. Thank you.

So as I said at the beginning, I am going to take

a brief recess, consider whether I am in a position to decide the motion orally. If I'm not, I will take it under advisement and write something. If I am, I will decide it orally. So we are in recess.

(Recess starting at 4:29 p.m. to 4:36 p.m.)

THE COURT: Thank you, Ms. Lesley. We will let everybody else come on in.

(Brief pause)

So after consideration of the arguments and the parties' briefs at the hearing today and considering the entire record, including the parties' declarations and the exhibits on which the parties rely, I am prepared to rule orally this afternoon. And I will deny plaintiffs' motion for temporary restraining order, and I will lay out my reasons for doing so.

A party seeking temporary restraining order, of course, bears the burden of demonstrating that it is a substantial likelihood, if succeeding on the merits, it will suffer irreparable harm if the injunction is not granted; other interested parties will not suffer substantial harm, if the injunction is granted; and the public interests would be furthered by the injunction.

Obviously, Courts have talked about sliding scales with respect to these factors, but it is, of course, always very important to consider a likelihood of successful on the

merits and irreparable harm.

In my view, plaintiffs' case for a TRO fails on the first part of this test because they have failed to demonstrate a substantial likelihood of success on the merits.

Plaintiffs don't allege that payment of the preclosing dividend would violate Delaware law. Indeed, they do not contest defendants' arguments that payment of the preclosing dividend is consistent with Delaware law.

Instead, they contend that payment of the preclosing dividend would violate Section 1 of the Sherman Act and its state law analogs.

One of the elements of the Section 1 claim, of course, is an agreement or conspiracy between two actors. But plaintiffs have failed to demonstrate an agreement or conspiracy between Kroger and Albertsons to pay the preclosing dividend to Albertsons' shareholders and/or an agreement to make Albertsons "cash poor."

There is no evidence of an agreement between Albertsons and Kroger to pay the pre-closing dividend. In fact, the evidence before the Court points to an independent decision by Albertsons to return value to its shareholders.

The primary evidence submitted by the plaintiffs is the merger agreement and the accompanying press release. But the merger agreement does not require the payment of the

preclosing dividend. The merger agreement caps the amount of the dividend to $4 billion and explains how the purchase price will be adjusted if the dividend is paid.

This all makes good sense. Kroger, knowing that Albertsons was considering the payment of such dividend, needed to ensure first that the preclosing dividend would not harm the company it was seeking to acquire; and, two, that Kroger was not overpaying to acquire Albertsons.

As for the press release, it states that the "Dividend has been declared in connection with the company -- that's Albertsons -- entering into an agreement and plan of merger."

This is consistent with the fact that Albertsons had determined to pay the dividend unilaterally and that the dividend would affect the purchase price, not an agreement between Kroger and Albertsons, that Albertsons was required to pay the dividend.

In fact, the evidence before this Court weighs against defining of an agreement obligating Albertsons to pay the dividend.

First, and again, nothing in the merger agreement obligates Albertsons to do so.

If, for example, Albertsons did not pay the dividend or decided to pay a smaller amount, Kroger would have no right to require its payment or to require payment

of $4 billion.

Second, the unrebutted declarations from Albertsons' President and CFO and Kroger's Senior VP and CFO state expressly that the parties never agreed that Albertsons was required to pay the dividend.

Instead, the essentially unrebutted declaration of Albertsons' president and CFO, Sharon McCollam, states that Albertsons had long considered a capital return strategy and that it wanted to maintain the flexibility to pay a dividend to its shareholders even if it entered into the merger agreement, but Albertsons recognized, as I noted before, that Kroger would want to adjust the purchase price if such a payment was made.

And the essentially unrebutted declaration of Kroger's senior Vice President and CFO, Gary Millerchip, similarly states that Albertsons had long made clear to Kroger that it "intended to pay the preclosing dividend regardless of whether or not there was a transaction with Kroger" -- that's Paragraph 12 -- and that quote, "The authority to declare and pay the preclosing dividend rests solely with Albertsons."

Based on the record before me, the relevance of the preclosing dividend's inclusion in the merger agreement was not to reflect that the parties had agreed that Albertsons was obligated to pay the dividend in order to

facilitate the merger or otherwise; but its inclusion was, rather, to take account of how it would affect the purchase price based on the value of Albertsons' assets at the time of the acquisition. Neither the merger agreement nor the press release show anything more, and the declaration of the two CFOs weigh against any potential inference to the contrary.

Plaintiffs do rely to some extent on certain other agreements -- these are, in fact, agreements -- between Kroger and Albertsons in Section 6 of the merger agreement relating to Albertsons' ability to undertake certain financial transactions before the deal closes.

But it is unclear whether plaintiffs' claim that those agreements, without more, could support a Section 1 claim. I think that's unlikely, but I do think that their claim is dependent on an agreement that there would be a payment of the preclosing dividend.

Second, in any event, even if there were evidence of an agreement to pay the preclosing dividend, or to pay the preclosing dividend and otherwise restrict Albertsons' ability to raise capital, there is insufficient evidence that Albertsons will not be able to effectively compete, or will otherwise restrain trade, during the pendency of the merger review.

Plaintiffs' argument is that Albertsons will be

undercapitalized after paying the special dividend and, as a result, will be unable to compete as vigorously while the transaction is reviewed.

As defendants note, payment of the dividend was reviewed by Goldman Sachs and by Credit Suisse, two respected companies who served as financial advisors to Albertsons regarding the payment.

The dividend was also separately approved by the Board independently of the merger. And, as I noted before, plaintiffs do not contest defendants' position that the special dividend is consistent with Delaware law, which provides that, "the directors of every corporation may declare and pay dividends upon the shares of its capital stock out of its surplus."

Albertsons calculated its surplus using different methods, but the more conservative approach, using the book value of its net assets, still calculated a surplus of $4.7 billion, which is more than the special dividend of $4 billion.

More important, plaintiffs have failed to show that after payment of the preclosing dividend, Albertsons will have insufficient liquidity to compete.

Plaintiffs essentially ignored that as a result of Albertsons' substantial operating revenues of approximately $69.7 billion in 2020 and $71.9 billion in 2021, which rose

to $75 billion for the rolling four quarters ended September 10, 2022, Albertsons generates significant excess cash flow.

In fact, Albertsons had earnings before interest, taxes, depreciation, and amortization, EBITDA, of about $15 billion from fiscal year 2018 through September 2022, including about $4.6 billion in the last four quarters.

And according to Professor Smith's essentially unrebutted declaration, consensus analyst estimates project that Albertsons will generate $76.6 billion in revenue with 4.4 billion in EBITDA in FY2022 and 77.6 billion with 4.4 billion in EBITDA in FY2023.

As a result, Albertsons may be able to meet its projected liquidity needs even after taking account of the preclosing dividend using excess cash flow, but Albertsons also has access to capital in other ways.

Albertsons intends to pay for the dividend, as we heard today, with cash in an already-established line of credit, but even then it will have at least $2.6 billion of that existing asset-based lending facility.

Plaintiffs have, at times, suggested that defendants won't -- (indiscernible) -- Albertsons that is not a necessary component of their claim, but I do think that incentives matter. In my view, neither Kroger nor Albertsons has an incentive to economically weaken Albertsons during the pendency of the merger review.

The record shows that Albertsons and Kroger are only direct competitors in a few markets. Most of their geographic markets do not overlap. It does not make sense to me that Kroger would want to weaken Albertsons during the two-year period of merger review before the acquisition is final and then pay almost $25 billion to acquire a weakened Albertsons.

Albertsons, of course, is aware that the merger may not be approved by regulators, so Albertsons has no incentive to weaken its own economic status during the next two years of merger review.

Plaintiffs have also raised the possibility that a weakened Albertsons would allow the parties to make a "failing firm defense" in connection with the merger review. In my view, at this point, that is essentially a non-issue because both companies have represented to this Court, and apparently to the plaintiffs here, that they will not raise such an argument or defense in connection with regulators' review. So, in my view, plaintiffs fail at prong one, likelihood of success on the merits.

The next factor, of course, is irreparable harm. In my view, plaintiffs have failed to satisfy their burden of proof on this prong, because they have failed to show that irreparable harm would be done if a TRO is not entered for essentially the same reasons I have already described

above -- and I'm not going to go through it again.

Plaintiffs have not established that payment of the preclosing dividend is likely to result in a lessening of competition, and that is the irreparable harm that they assert here.

The other two factors in my view aren't particularly critical in light of my determination that plaintiffs have failed to satisfy the first two factors, because plaintiffs cannot demonstrate a likelihood of success on the merits and because they cannot demonstrate that there will be harm to competition from payment of the preclosing dividend, in my view plaintiffs have failed to show that it is in the public interest to enter a temporary restraining order.

It's not clear to me that there is really any other parties that matter a lot here, but obviously, the -- a TRO prohibiting the payment of the dividend would interfere with Albertsons' board's and corporate decision that's the special dividends are in the company's and shareholders' interest. So it would harm Albertsons.

And the TRO would harm at least certain shareholders, whether new or long-standing, who acted in reliance on the commitment to pay the dividend.

So in light of all of these factors and taking account of all of the evidence before me, I deny the

plaintiffs' motion for a temporary restraining order. A written order, a very basic written order, will issue.

Having said all of that, is there anything else we should discuss today from the plaintiffs' perspective?

MR. GITLIN: Nothing, Your Honor.

THE COURT: Thank you. From the defendants' perspective?

MR. HASSI: Nothing, Your Honor.

MR. WOLF: Nothing, Your Honor.

THE COURT: Okay. Thank you, all.

C E R T I F I C A T E

I, Lorraine T. Herman, Official Court Reporter, certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

November 9, 2022 /s/
DATE Lorraine T. Herman

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Albertsons [144]
Albertsons' [38] 6/6 6/20 8/19 8/21 8/23 9/8 9/17 11/2 12/21 13/22 14/21 15/21 17/17 19/25 22/1 22/5 22/19 28/14 30/2 30/22 37/4 37/8 40/6 41/3 51/23 58/4 60/6 60/7 61/21 64/12 66/17 68/3 68/7 69/3 69/11 69/20 70/24 73/18
all [36] 3/8 4/9 8/5 8/14 8/25 15/18 17/5 19/3 21/21 22/1 22/2 23/10 25/23 27/21 29/5 30/20 31/7 40/20 42/5 43/19 43/22 44/16 46/6 46/6 47/14 53/9 54/5 56/4 61/15 63/16 67/4 73/24 73/25 74/3 74/10
allegation [1] 55/1
allegations [1] 53/18
allege [1] 66/6
alleging [2] 23/18 24/15
allow [3] 10/18 18/10 72/13
allowing [1] 44/18
allows [1] 9/18
almost [5] 14/3 19/8 54/18 62/12 72/6
alone [2] 12/8 30/4
alongside [1] 40/12
already [3] 39/25 71/17 72/25
already-established [1] 71/17
also [13] 2/18 3/14 5/21 6/14 7/7 12/15 17/7 18/15 19/3 63/5 70/8 71/15 72/12
alternatively [2] 32/16 32/17
always [3] 54/9 54/9 65/24
am [15] 4/20 4/21 5/1 14/14 18/1 31/17 36/12 41/13 51/3 57/11 59/12 64/25 65/1 65/3 65/12
Amazon [1] 42/10
among [1] 20/20
amortization [1] 71/4
amount [24] 12/8 13/8 15/20 20/25 21/1 29/9 29/19 29/20 30/1 30/15 37/6 37/12 42/4 46/1 55/18 55/24 58/8 60/24 62/8 62/11 63/21 63/22 67/1 67/24
analogs [1] 66/12
analysis [4] 15/20 24/21 43/10 64/6
analyst [1] 71/8
ancillary [1] 33/16
Angeles [1] 1/25
announce [1] 40/7
announced [12] 8/19 10/7 20/23 20/24 22/21 28/21 36/5 36/10 36/14 36/21 36/22 58/7
announcement [1] 13/14
announcing [1] 59/20
another [4] 26/22 49/4 58/19 59/10
answer [2] 7/14 16/3
anti [2] 17/18 32/14
anti-competitive [2] 17/18 32/14
anticipated [1] 27/14
anticipates [1] 64/17
anticompetitive [2] 19/18 26/19
antitrust [30] 7/23 7/25 8/13 8/17 14/11 15/2 15/3 16/4 19/15 20/5 20/13 22/10 22/25 24/20 25/22 26/24 27/14 27/15 33/5 34/18 36/11 41/14 44/16 51/25 52/18 53/18 54/24 55/8 59/1 59/18
any [23] 5/8 5/13 12/7 12/7 15/24 17/8 20/16 21/10 22/8 22/8 25/5 25/6 30/14 45/25 55/21 60/6 62/18 62/25 63/4 64/22 69/6 69/18 73/15
anybody [1] 9/2
anything [8] 26/25 36/23 38/19 46/25 52/6 64/20 69/5 74/3
anywhere [1] 56/24
apparently [1] 72/17
APPEARANCES [2] 1/12 2/1
appears [1] 27/15
applies [1] 13/10
apply [1] 17/10
appreciate [2] 5/21 44/9
approach [1] 70/16
approve [3] 29/1 36/25 37/1
approved [3] 19/14 70/8 72/9
approximately [2] 9/17 70/24
are [126]
are ordinary [1] 44/14
aren't [3] 8/8 40/24 73/6
arguing [1] 56/18
argument [13] 4/14

A

argument... [12] 9/4 9/4 12/1 15/15 15/16 16/10 56/14 56/24 60/2 60/3 69/25 72/18
arguments [3] 54/10 65/9 66/8
arise [1] 41/12
ARNOLD [3] 2/8 4/5 5/4
around [2] 23/6 59/18
Arthur [2] 1/14 3/13
articulated [1] 32/23
as [97]
Ascher [2] 2/14 3/23
aside [2] 13/4 23/4
ask [7] 9/5 16/4 16/5 22/12 34/8 57/24 61/17
asked [5] 43/9 44/3 48/11 48/21 60/8
asking [5] 30/12 34/8 34/24 43/15 43/16
assert [1] 73/5
assertion [1] 53/17
asset [2] 24/18 71/19
asset-based [1] 71/19
assets [4] 17/1 24/22 69/3 70/17
assume [7] 8/10 15/5 15/6 24/1 24/6 38/19 51/11
assumed [3] 37/19 47/21 47/21
assuming [4] 6/9 37/15 37/15 47/23
attempt [1] 56/14
ATTNY [1] 1/16
ATTORNEY [2] 1/20 1/23
authority [5] 7/15 7/17 7/19 54/3 68/20
availability [1] 33/22
available [3] 18/14 42/5 50/3
Avenue [3] 2/8 2/12 2/21
avoidance [1] 5/8
avoided [1] 27/19
aware [3] 36/12 36/13 72/8
away [5] 17/5 31/24 37/20 52/25 55/23

B

back [11] 4/20 10/19 29/19 34/21 35/2 39/22 40/8 45/10 47/18 48/2 59/22
balance [6] 19/9 22/5 40/23 45/1 60/17 61/3
bankers [1] 41/16
Bankruptcy [1] 2/21
Banks [1] 2/2
based [8] 9/25 23/1 42/6 43/16 50/10 68/22 69/3 71/19
basic [1] 74/2
basically [5] 12/17 26/17 39/8 47/25 55/13
basis [1] 53/16
BAX [1] 11/4
be [94]
be-all [1] 46/6
bears [1] 65/17
because [49] 5/9 6/3 6/13 7/1 7/8 7/23 11/10 15/2 15/13 17/3 21/5 22/16 23/4 23/9 23/14 25/3 25/17 27/5 27/15 28/16 29/19 29/20 30/8 31/20 33/1 33/5 35/1 40/24 41/7 41/11 42/1 42/3 42/22 43/22 46/8 48/21 49/2 50/12 51/1 56/10 56/14 57/13 57/18 59/20 66/3 72/16 72/23 73/9 73/10
become [1] 17/22
been [21] 6/3 11/10 13/13 15/1 15/22 28/9 32/22 36/11 45/6 45/7 45/7 45/8 45/9 48/5 50/15 52/17 59/6 60/23 60/24 63/14 67/10
before [22] 1/10 11/21 25/14 25/18 31/13 45/15 46/7 49/10 49/24 49/25 50/1 61/24 62/9 66/21 67/18 68/11 68/22 69/12 70/9 71/3 72/5 73/25
beginning [4] 3/10 15/1 57/25 64/25
behalf [1] 28/5
being [6] 9/2 20/24 21/4 26/17 42/3 50/19
believe [7] 8/23 15/22 15/25 32/25 41/2 54/23 62/19
believe their [1] 32/25
belong [1] 5/5
below [1] 42/14
Bernstein [2] 2/6 5/3
best [6] 12/2 38/18 51/6 56/15 62/20 63/1
best to [1] 38/18
better [10] 10/10 24/8 24/10 41/7 41/8 42/16 44/11 47/2 47/16 63/23
between [19] 9/21 12/4 16/19 20/23 21/1 21/3 21/11 30/11 30/22 31/1 32/4 32/9 32/12 55/18 66/14 66/16 66/19 67/16 69/9
billion [62] 5/25 9/18 10/21 12/3 12/15 15/9 18/12 18/18 18/20 19/1 19/2 19/6 19/11 26/4 28/8 28/12 28/12 32/2 37/11 37/21 39/4 39/4 41/18 41/18 41/22 42/3 42/5 47/22 50/14 55/18 55/21 55/23 55/24 58/3 60/3 60/4 60/16 61/1 61/19 61/24 62/1 62/13 63/6 64/15 64/16 64/17 64/22 67/2 68/1 70/18 70/19 70/25 70/25 71/1 71/5 71/6 71/9 71/10 71/10 71/11 71/18 72/6
bit [4] 20/15 39/7 44/11 49/12
block [5] 2/16 3/23 27/7 57/1 57/3
blue [1] 39/5
board [12] 19/13 19/20 28/14 28/23 28/23 36/24 36/24 37/16 40/2 41/3 41/17 70/9
board's [1] 73/18
boilerplate [4] 22/6 54/19 54/19 54/23
bond [2] 48/4 48/7
bonds [2] 16/21 16/25
book [1] 70/16
books [9] 10/11 11/3 39/13 41/22 42/11 50/12 50/23 51/19 60/11
bootstrap [1] 33/10
borrow [3] 17/7 44/2 45/21
borrowed [1] 60/4
borrowing [2] 42/19 42/20
both [7] 5/5 21/18 29/12 40/19 45/8 58/10 72/16
bottom [2] 41/20 42/15
bought [1] 50/19
brief [11] 4/16 4/24 5/23 23/17 30/7 52/16 53/20 54/12 57/7 65/1 65/8
briefing [2] 6/3 15/23
briefs [2] 4/9 65/10
bring [1] 48/12
broader [1] 59/9
broke [2] 23/19 23/21
brought [1] 25/14
bullet [1] 40/5
bunch [4] 17/7 20/3 40/22 44/24
burden [2] 65/17 72/22
business [6] 5/21 21/8 42/3 56/5 56/6 60/6
buy [4] 23/11 39/22 44/24 44/25
buy-back [1] 39/22
buyer [3] 33/14 44/19 44/19
buying [3] 43/24 46/10 46/11

C

CA [1] 1/25
calculated [3] 58/15 70/15 70/17
California [3] 1/23 1/23 3/16
call [1] 48/21
called [1] 54/18
campaigns [1] 17/12
can [20] 7/17 11/14 12/11 19/17 20/5 21/16 33/6 33/6 33/12 34/9 44/11 46/4 48/2 48/2 48/12 51/5 53/19 57/9 57/21 64/14
can't [11] 7/2 12/14 17/7 22/7 22/8 23/19 36/9 41/10 46/5 46/7 59/17
candidly [2] 36/18

C

candidly... [1] 52/20
cannot [5] 34/23 53/7 63/9 73/9 73/10
cap [3] 31/22 31/23 31/25
capital [22] 6/6 6/15 6/22 7/9 7/10 9/9 10/14 16/22 16/24 17/3 18/4 28/16 28/18 29/3 29/14 36/18 58/4 64/18 68/8 69/21 70/13 71/15
caps [1] 67/1
CARL [2] 1/10 1/13
case [14] 3/3 9/1 9/14 11/4 11/5 27/5 27/6 29/6 48/12 48/22 54/11 59/6 59/14 66/2
cases [1] 50/2
cash [38] 9/18 18/9 18/18 22/3 39/5 39/5 39/8 39/9 39/12 39/12 39/15 39/17 39/22 40/11 40/23 41/6 41/21 41/22 41/25 42/5 42/11 42/14 43/6 43/12 45/8 46/16 46/18 61/25 62/2 62/9 62/21 63/8 63/22 64/15 66/18 71/2 71/14 71/17
caught [1] 27/13
cease [1] 20/7
central [1] 42/1
certain [13] 6/20 15/20 30/23 32/14 42/4 52/24 60/24 62/3 62/8 64/10 69/8 69/11 73/21
certainly [3] 5/13 32/3 53/6
certify [1] 75/4
CFO [7] 19/14 35/22 43/1 68/3 68/3 68/7 68/15
CFOs [2] 29/12 69/6
chain [1] 46/10
challenge [2] 36/11 58/1
challenging [3] 7/4 25/12 25/16
chance [2] 47/23 63/4
change [1] 26/7
changes [1] 62/14
changing [1] 43/3
check [1] 44/17
Cheerios [1] 45/25
Chicago [2] 1/21 2/17
chief [1] 4/1
choose [1] 42/23
chosen [1] 54/7
circumstances [3] 20/17 27/11 53/14
circumstantial [3] 33/6 34/7 36/1
circumventing [1] 8/17
cite [3] 7/17 7/19 11/4
Civil [2] 1/3 3/3
claim [13] 6/25 11/25 14/4 20/13 25/13 32/7 35/19 55/16 66/13 69/13 69/15 69/16 71/22
claims [1] 8/12
clarification [1] 57/20
Clark [1] 2/16
clear [13] 6/17 15/8 29/12 40/18 40/18 50/6 50/9 57/6 57/8 57/17 60/21 68/16 73/15
clearly [2] 30/21 38/19
client [4] 52/17 52/19 53/17 55/7
clients [1] 3/25
close [4] 6/8 20/3 23/13 23/14
closer [1] 25/8
closes [3] 7/11 48/25 69/12
closing [4] 11/20 12/16 29/21 66/20
club [2] 5/5 5/5
CO [1] 1/6
colloquial [2] 5/10 10/10
COLUMBIA [4] 1/1 1/3 3/3 3/12
Comber [2] 1/14 3/13
come [3] 3/9 4/20 65/7
coming [5] 17/2 19/4 44/1 61/2 61/3
commensurate [2] 54/12 54/14
commit [1] 36/9
commitment [3] 34/25 35/3 73/23
committed [2] 53/17 55/7
committing [1] 52/17
common [2] 34/25 35/3
companies [12] 16/23 16/25 21/19 32/4 32/9 47/11 49/19 63/18 64/8 64/10 70/6 72/16
company [35] 3/4 11/6 19/23 28/7 35/22 39/15 39/21 41/11 41/15 42/6 42/7 42/20 42/21 43/2 43/9 44/2 44/25 44/25 45/3 45/12 45/19 45/24 46/2 46/8 46/9 46/14 47/20 48/2 50/11 50/11 50/17 50/22 50/25 67/7 67/11
company's [6] 42/16 47/10 50/23 62/20 63/1 73/19
comparable [2] 27/8 64/11
compete [22] 6/7 9/12 9/19 10/14 10/24 15/12 17/6 17/11 17/16 17/18 17/24 18/5 20/7 23/19 37/4 37/8 37/13 43/6 63/11 69/22 70/2 70/22
competed [1] 42/9
competing [1] 21/19
competition [11] 15/12 20/5 20/8 33/1 35/7 37/23 54/15 58/25 63/12 73/4 73/11
competitive [5] 16/11 17/18 32/14 38/4 64/14
competitiveness [5] 16/8 17/25 19/25 22/20 60/7
competitor [6] 16/17 24/2 25/2 25/2 58/13 64/9
competitors [6] 16/19 17/23 20/7 25/4 63/24 72/2
complaint [6] 17/20 22/22 35/14 57/8 57/10 58/11
complies [1] 8/5
component [1] 71/22
computer [1] 2/25
computer-aided [1] 2/25
concern [4] 16/6 20/1 43/17 43/17
concerns [2] 7/24 60/25
conclude [2] 6/17 31/1
conclusion [1] 59/6
conclusions [1] 36/23
condemnation [1] 25/8
condition [1] 15/21
conditioned [1] 45/18
conditions [2] 13/1 22/2
conduct [3] 14/17 45/11 53/23
confer [1] 48/21
conferring [1] 49/5
confirm [2] 47/19 55/11
conflate [2] 31/9 31/19
conflating [2] 35/9 35/11
conjunction [1] 27/23
connection [6] 6/1 20/24 34/10 67/10 72/14 72/18
connects [1] 34/14
conscious [2] 34/25 35/2
consciously [1] 59/19
consecutively [1] 40/25
consensus [1] 71/8
consent [5] 45/16 45/17 46/5 46/5 46/12
consequence [1] 24/6
conservative [1] 70/16
consider [5] 4/17 28/15 61/8 65/1 65/25
consideration [1] 65/9
considered [4] 39/23 47/10 62/9 68/8
considering [9] 40/12 41/4 41/5 41/7 52/19 61/5 61/6 65/10 67/5
consistent [5] 8/11 13/24 66/9 67/13 70/11
conspiracy [2] 66/14 66/16
Constitution [1] 2/21
constraint [1] 46/6
consult [1] 25/5
consumers [3] 9/23 20/9 24/11
consummate [1] 63/21
CONT'D [1] 2/1

C

contains [4] 13/9 13/10 26/6 58/10
contemplated [1] 62/24
contemplating [1] 40/6
contend [1] 66/10
contending [1] 8/8
contest [2] 66/8 70/10
context [2] 25/6 33/17
continue [5] 28/19 43/4 43/5 43/6 61/8
contract [1] 14/12
contrary [3] 9/4 30/3 69/7
control [3] 11/23 44/19 53/9
conversation [1] 40/3
converted [1] 49/18
convince [1] 36/6
cooked [1] 62/19
cooperating [1] 26/21
copies [1] 38/20
copy [1] 38/11
corners [1] 31/16
corporate [8] 10/8 19/13 42/23 43/10 43/11 47/18 51/7 73/18
corporation [3] 11/12 43/13 70/12
correct [13] 7/14 24/3 24/4 24/19 29/9 30/18 38/1 47/19 56/1 58/5 58/6 59/2 75/4
cost [1] 17/3
could [13] 13/20 14/17 14/17 19/4 22/23 27/18 37/7 38/6 38/6 41/12 48/10 50/7 69/14
counsel [17] 3/5 3/7 3/8 3/23 3/25 4/1 4/5 27/1 27/15 28/1 30/13 52/8 53/12 54/17 56/7 59/7 64/19
counsel's [1] 3/13
count [1] 5/6
country [2] 5/5 16/15
County [1] 48/25
couple [3] 31/6 49/22 59/3
course [20] 21/15 33/13 33/16 37/24 44/14 44/21 44/22 45/13 46/15 52/9 52/22 53/13 55/12 55/24 63/6 65/17 65/24 66/14 72/8 72/21
court [19] 1/1 2/20 5/20 7/19 8/20 11/5 11/9 27/17 48/16 48/20 49/23 51/4 57/9 58/19 60/18 66/21 67/18 72/16 75/3
Courthouse [1] 48/25
Courts [2] 26/20 65/23
covenants [9] 21/9 21/16 33/13 33/21 33/24 44/6 44/14 45/10 45/14
cover [3] 18/14 18/16 19/4
covers [1] 21/13
CRC [1] 2/20
create [2] 51/19 54/20
created [1] 51/13
creates [3] 5/13 22/9 25/22
credit [8] 19/6 47/9 48/1 48/2 60/4 62/20 70/5 71/8
critical [1] 73/7
crown [1] 46/11
Crystal [1] 15/8
Cts [1] 2/21
culminated [1] 28/22
culmination [1] 36/4
current [5] 18/20 58/1 61/21 62/2 62/23
currently [1] 40/6

D

D.C [4] 1/16 2/9 2/22 3/22
damage [3] 32/9 35/7 35/7
dark [1] 39/5
data [1] 18/6
date [3] 49/4 51/8 75/10
David [1] 2/11
day [7] 24/25 30/1 33/14 34/12 49/15 52/18 58/7
days [1] 36/15
DC [5] 1/7 1/17 2/4 2/9 2/13
deal [5] 19/14 32/18 44/11 53/1 69/12
DEBEVOISE [3] 2/12 3/22 28/5
debt [23] 6/22 25/6 40/11 42/14 42/15 42/19 42/21 42/22 42/24 44/23 44/24 44/25 45/3 45/7 45/19 46/2 46/8 46/13 47/1 48/3 50/24 63/17 63/23
debt-laden [1] 44/25
debts [1] 62/6
decide [3] 22/25 65/2 65/3
decided [9] 13/16 13/23 20/11 27/20 27/21 30/16 59/19 64/13 67/24
decision [9] 8/10 11/18 13/22 30/2 30/3 31/20 53/9 66/22 73/18
decision-making [1] 53/9
decisions [1] 64/13
deck [3] 59/23 61/18 62/17
declaration [9] 15/19 15/25 16/1 43/2 62/5 68/6 68/14 69/5 71/8
declarations [6] 4/10 4/10 15/11 29/12 65/11 68/2
declare [2] 68/20 70/13
declared [7] 7/18 7/18 8/14 11/10 27/10 35/22 67/10
declaring [1] 11/12
decreases [1] 42/15
deep [2] 16/7 20/2
defendant [3] 2/2 2/10 11/6
defendant's [3] 15/23 15/23 15/24
defendants [20] 1/7 4/14 5/3 6/11 6/18 8/4 11/16 15/10 18/5 23/9 26/18 54/14 56/11 56/21 57/12 58/2 59/23 64/20 70/4 71/21
defendants' [8] 6/4 9/5 53/24 60/2 60/2 66/8 70/10 74/6
defense [10] 3/7 11/8 11/9 11/14 35/15 35/18 51/5 51/5 72/14 72/18
defenses [1] 11/6
define [1] 64/9
defined [2] 12/15 48/3
defining [1] 67/19
definition [2] 12/9 53/14
definitive [1] 45/25
Delaware [20] 7/13 7/24 8/5 8/11 8/15 8/19 10/6 10/8 19/12 43/8 43/10 43/10 43/13 51/1 51/4 51/7 59/14 66/7 66/9 70/11
delayed [1] 45/18
demand [1] 53/5
demonstrate [4] 66/4 66/15 73/9 73/10
demonstrating [1] 65/17
Dentists [1] 7/25
deny [3] 30/10 65/13 73/25
Department [1] 27/6
depend [1] 20/19
dependent [2] 32/22 69/16
depending [1] 5/1
depends [3] 15/12 64/5 64/9
depreciation [1] 71/4
deprive [1] 7/8
described [1] 72/25
despite [1] 13/16
detail [1] 15/20
determination [1] 73/7
determined [2] 62/7 67/14
did [12] 6/23 11/9 14/22 22/16 30/16 36/17 50/23 55/7 61/7 61/8 61/23 67/23
didn't [11] 10/15 11/8 16/4 20/14 23/21 29/18 35/20 36/18 56/18 57/14 60/1
difference [2] 16/19 21/3
different [8] 8/3 12/12 22/12 43/1 43/11 61/10 64/7 70/15
direct [6] 33/6 33/7 34/4 34/5 35/2 72/2

D
directors [1] 70/12
discernible [1] 60/6
disclose [2] 4/25 5/14
disclosure [2] 4/24 5/7
discovery [2] 22/23 58/14
discretionary [1] 43/23
discuss [1] 74/4
discussed [6] 17/19 17/20 29/7 29/11 29/11 61/7
discussion [5] 26/14 40/5 55/9 57/19 59/23
discussions [1] 61/8
dismembered [1] 7/2
dispute [2] 61/20 62/12
disputing [1] 62/25
distress [2] 16/7 20/2
distribution [4] 41/18 62/22 62/24 63/25
DISTRICT [7] 1/1 1/1 1/3 1/10 2/21 3/3 3/12
District's [1] 22/14
dividend [187]
dividend's [1] 68/23
dividends [4] 8/7 45/4 70/13 73/19
do [65] 4/19 4/24 8/18 8/18 11/13 13/12 15/3 15/4 20/10 21/17 21/17 24/8 24/10 24/11 25/11 26/12 26/12 26/15 27/21 29/17 30/16 31/12 33/10 33/18 33/19 33/25 34/1 34/24 37/2 37/14 38/6 38/13 38/17 38/18 38/21 39/17 40/18 40/19 40/19 40/19 41/8 41/10 42/12 43/7 43/22 46/7 46/25 49/7 51/6 51/16 56/6 56/23 57/17 61/20 62/18 63/10 63/13 64/7 66/8 67/22 69/8 69/15 70/10 71/22 72/3
document [4] 31/16 41/2 41/4 42/13
documents [2] 38/15 46/15
does [18] 6/9 12/6 16/13 20/19 20/19 24/11 25/1 30/20 31/22 38/11 46/25 49/17 50/11 54/5 55/21 60/19 66/25 72/3
doesn't [17] 10/13 18/1 23/12 23/14 26/6 26/16 26/20 31/25 32/1 32/3 42/21 44/24 46/8 46/14 46/18 48/3 64/1
doesn't matter [1] 64/1
doing [13] 9/23 19/10 19/14 28/9 29/13 40/11 41/10 42/22 46/14 58/23 63/19 63/20 65/15
dollars [4] 19/2 19/6 61/24 62/1
don't [50] 5/13 7/23 8/13 8/23 8/25 9/3 9/13 9/14 9/20 10/17 10/17 10/25 10/25 11/2 12/23 12/24 13/15 14/1 15/21 16/4 18/12 18/17 21/2 21/10 21/21 21/22 22/25 24/7 24/7 24/9 25/9 26/15 30/10 32/16 32/21 33/19 33/24 34/16 39/8 39/15 42/25 46/20 49/6 50/21 52/13 57/3 60/15 63/15 63/16 66/6
done [4] 13/21 27/10 40/9 72/24
double [1] 62/12
doubt [2] 5/8 62/12
down [8] 33/18 39/8 42/14 45/7 45/7 45/7 45/8 46/8
downturn [3] 16/14 17/2 17/9
Dr. [2] 15/19 17/20
Dr. Michael [1] 15/19
Dr. Weisbach [1] 17/20
drain [1] 22/1
draw [3] 19/22 36/22 39/8
due [1] 29/4
dumb [1] 37/16
during [10] 9/19 17/1 24/23 32/5 43/18 43/21 69/23 71/25 72/4 72/10

E
each [2] 5/4 26/11
earlier [3] 27/10 27/11 36/15
early [1] 23/5
earnings [2] 40/7 71/3
easier [1] 16/21
easy [1] 15/6
eat [2] 43/19 43/22
EBITDA [5] 18/7 45/3 71/4 71/10 71/11
economic [4] 16/14 17/1 17/9 72/10
economically [1] 71/24
Edward [1] 2/11
effect [11] 10/13 10/18 18/7 21/7 35/6 35/25 51/20 51/21 51/22 52/3 58/23
effectively [2] 9/12 69/22
effects [2] 19/18 55/5
effort [2] 50/7 58/16
either [4] 4/20 34/19 36/13 59/12
elements [1] 66/13
Elizabeth [4] 1/14 1/19 3/6 3/13
else [7] 26/25 52/6 62/14 64/20 64/23 65/7 74/3
emailed [1] 35/16
embarked [1] 28/20
emergency [1] 50/4
emphasize [1] 40/1
empirical [1] 17/19
employees [1] 15/11
end [7] 9/23 23/17 24/25 26/17 30/1 41/21 46/6
end-all [1] 46/6
ended [1] 71/1
ending [2] 41/21 41/25
enforceable [1] 21/23
engage [3] 6/20 28/15 30/23
enjoin [2] 5/17 5/25
enjoined [1] 8/20
enough [7] 30/25 31/3 32/15 37/16 37/22 37/25 46/16
ensure [2] 11/19 67/6
enter [10] 9/9 9/13 10/19 23/7 24/14 24/17 35/1 35/3 51/17 73/13
entered [9] 6/11 9/11 22/14 22/15 22/18 26/18 44/15 68/10 72/24
entering [4] 16/14 24/16 45/24 67/11
entire [2] 33/17 65/11
entitled [5] 38/24 43/7 43/13 50/14 75/5
entitlement [1] 54/8
entity [1] 17/22
equity [2] 24/18 40/13
equivalence [2] 9/20 39/5
equivalents [1] 39/9
essentially [14] 10/1 10/21 21/17 26/13 27/17 56/11 60/10 60/18 68/6 68/14 70/23 71/7 72/15 72/25
established [2] 71/17 73/2
estimate [2] 41/21 63/1
estimates [2] 62/21 71/8
et [4] 1/3 1/6 3/3 3/4
evaluated [1] 36/18
even [24] 5/7 8/20 9/9 9/11 15/22 18/25 21/12 23/20 34/15 42/12 45/8 51/11 56/14 60/3 60/10 62/13 62/22 63/4 63/16 63/24 68/10 69/18 71/13 71/18
event [1] 69/18
ever [2] 11/14 28/9
every [5] 16/17 18/24 33/14 51/5 70/12
everybody [3] 42/9 42/10 65/7
everyone [2] 4/7 5/12
evidence [23] 7/15 12/2 23/4 30/2 33/5 33/6 33/7 33/8 34/3 34/4 34/5 34/7 35/2 36/2 43/20 58/19 66/19 66/21 66/23 67/18 69/18 69/21 73/25
evidence in [1] 58/19
evidently [1] 27/14
Ewart [1] 2/7

E

ex [3] 15/6 49/7 49/24
exacerbate [1] 55/5
exact [2] 6/10 25/16
exactly [7] 18/13 37/18 48/14 50/24 51/22 55/19 56/1
example [9] 11/4 18/7 18/8 21/6 33/22 44/23 47/15 53/19 67/23
exceeded [1] 31/23
exceeding [2] 28/8 46/1
except [1] 19/20
excerpts [3] 38/14 38/15 40/24
excess [3] 42/11 71/2 71/14
excuse [2] 12/14 45/4
executives [2] 15/24 64/13
exhibits [2] 4/11 65/12
existing [1] 71/19
exit [1] 24/18
expect [4] 49/10 51/23 51/24 52/8
expectation [2] 50/20 51/2
expected [1] 18/21
expecting [1] 42/20
expects [4] 18/22 42/12 44/2 46/18
experience [1] 48/24
expert [5] 4/10 15/10 15/19 15/23 18/7
experts [1] 42/2
expires [1] 49/18
explains [1] 67/2
expressly [3] 14/16 15/7 68/4
extensive [1] 7/3
extent [5] 11/24 29/8 33/23 59/16 69/8
extra [1] 54/22
extraordinary [2] 53/14 53/15
extremely [1] 23/20
eye [1] 27/13
eyes [1] 44/10

F

face [1] 34/11
faced [1] 24/12
facilitate [1] 69/1
facility [4] 19/7 60/5 60/22 71/19
fact [22] 8/11 13/16 16/2 18/8 19/20 23/6 24/22 26/6 26/7 29/19 31/1 36/4 36/16 37/5 49/1 61/5 63/16 66/21 67/13 67/18 69/9 71/3
fact that [1] 13/16
fact-gathering [1] 23/6
factor [1] 72/21
factors [4] 65/24 73/6 73/8 73/24
facts [1] 30/24
fail [1] 72/19
failed [8] 27/16 66/3 66/15 70/20 72/22 72/23 73/8 73/12
failing [3] 35/15 35/17 72/14
fails [1] 66/2
fair [2] 15/20 47/13
fairly [1] 7/3
familiar [1] 4/12
fatal [1] 14/4
February [1] 28/22
Federation [1] 7/25
felt [1] 20/9
few [5] 5/21 15/24 19/2 60/23 72/2
fiercely [1] 42/9
figure [1] 18/13
figured [1] 51/21
filed [2] 22/22 30/6
final [1] 72/6
finance [1] 42/24
financed [1] 40/10
financial [13] 6/20 10/23 15/21 16/7 18/6 18/11 18/21 24/6 30/23 61/21 63/2 69/12 70/6
financially [1] 46/9
find [3] 6/23 44/7 46/23
fine [1] 54/8
firm [4] 3/24 35/15 35/17 72/14
first [15] 8/25 15/18 26/22 28/23 29/11 30/20 31/7 38/23 40/2 46/4 59/25 66/3 67/6 67/21 73/8
fiscal [1] 71/5
fixed [1] 62/6
flaw [1] 54/2
flexibility [2] 17/15 68/9
flip [2] 40/21 40/21
float [1] 50/18
floating [1] 48/1
flow [4] 40/23 46/16 71/2 71/14
focus [2] 6/3 56/21
following [2] 40/5 40/7
foregoing [1] 75/4
forgotten [1] 47/1
form [2] 30/15 63/8
formal [2] 5/2 5/11
formalities [1] 14/11
forth [1] 22/9
Fortune [1] 28/7
forward [1] 3/9
found [1] 43/12
four [4] 31/16 36/15 71/1 71/6
frankly [3] 29/8 54/17 60/1
free [4] 13/12 13/13 46/16 55/16
friend [1] 5/1
friends [2] 5/9 5/10
front [1] 50/8
full [3] 21/19 33/2 44/10
full-text [1] 44/10
fully [2] 17/16 23/19
function [2] 60/22 62/4
fund [1] 47/2
fundamental [1] 54/2
further [1] 52/11
furthered [1] 65/22
future [7] 9/8 10/14 37/4 42/12 43/17 62/21 63/2
FY2022 [1] 71/10
FY2023 [1] 71/11

G

Gabriel [2] 2/15 3/8
gained [1] 42/11
Gary [1] 68/15
gathering [1] 23/6
general [7] 1/16 3/25 7/22 17/2 39/14 43/11 60/5
GENERAL'S [2] 1/20 1/23
generally [1] 25/17
generate [2] 63/8 71/9
generates [2] 46/16 71/2
Gentry [1] 1/14
Geoffrey [2] 1/14 3/13
geographic [1] 72/3
get [21] 7/23 10/4 22/23 24/18 24/24 25/7 28/19 31/3 40/9 43/23 45/15 47/18 47/23 48/13 49/3 49/3 50/2 50/8 51/4 51/9 59/17
gets [6] 24/17 25/1 25/2 42/16 60/16 60/18
getting [2] 10/19 50/20
Gibson [2] 1/23 3/6
Gillett [1] 2/15
Gillette [1] 3/8
Gitlin [5] 1/13 3/12 5/17 50/10 51/3
give [6] 4/15 4/21 27/2 44/7 46/4 52/9
given [1] 60/1
glove [1] 54/21
go [22] 17/8 25/1 39/24 41/20 42/20 42/21 42/24 43/19 43/24 44/21 45/19 45/21 46/2 46/3 46/7 46/13 50/24 52/24 54/17 59/22 61/4 73/1
goal [1] 24/20
goes [9] 15/19 23/19 24/25 27/17 39/25 41/25 42/16 55/22 56/24
going [63] 9/1 9/10 10/10 11/2 15/13 15/13 16/5 16/6 16/6 16/7 16/21 16/23 17/5 17/6 17/8 17/10 17/10 17/15 19/9 20/1 22/3 23/12 24/23 24/24 29/17 29/24 33/25 34/11 35/18 35/19 35/23 35/23 36/20 40/18 40/19 42/14 42/14 42/18 44/1 44/9 44/20 44/21 44/23 45/7 45/8 45/13 46/19 48/7 49/1 49/3 49/13 52/25 57/3 57/12 60/5 61/1 61/3 62/23 63/11 64/15

G
going... [3] 64/17 64/25 73/1
Goldman [1] 70/5
Goldman's [1] 62/20
Goldstein [2] 2/15 3/8
golf [1] 5/5
good [11] 3/2 3/11 3/17 3/21 4/2 4/4 4/7 28/3 28/4 34/21 67/4
got [7] 10/18 17/23 30/9 31/16 36/24 44/25 46/3
GOTSHAL [1] 2/3
governance [1] 10/8
government [1] 27/16
government's [4] 13/5 13/19 13/19 22/13
grade [2] 16/20 16/25
granted [4] 60/10 62/17 65/19 65/21
graphical [1] 39/1
great [1] 60/15
grocery [3] 28/17 43/19 43/21
gross [1] 18/9
grow [1] 28/17
growth [1] 28/17
guess [3] 22/11 61/18 62/17
guessing [1] 19/19
guides [1] 45/2
gun [1] 44/18
gun-jumping [1] 44/18

H
had [27] 5/20 5/22 11/10 13/14 13/20 13/23 14/5 19/3 20/10 27/10 28/7 32/24 36/10 37/5 41/24 43/12 45/6 53/17 54/7 61/7 61/15 63/3 67/14 68/8 68/16 68/24 71/3
half [6] 19/6 19/8 41/18 41/22 60/3 61/1
hampered [1] 9/12
hamstrung [1] 37/13
hand [8] 7/8 7/10 9/18 17/6 40/11 54/21 63/22 64/15
hands [1] 25/4
hangs [1] 43/18
happen [1] 49/13
happened [1] 50/6
happening [3] 21/21 45/9 48/14
happens [1] 21/20
happy [3] 31/17 46/21 50/16
harder [1] 16/24
harm [16] 17/18 32/4 33/1 57/18 59/15 59/16 65/19 65/20 66/1 67/7 72/21 72/24 73/4 73/11 73/20 73/21
harmed [1] 50/11
harming [1] 58/25
harms [1] 60/19
Harper [3] 1/19 2/18 3/6
Harris [1] 31/11
has [60] 5/20 7/9 8/19 9/17 10/23 11/1 11/1 11/22 11/25 12/18 12/25 15/1 15/22 17/23 21/5 22/4 23/11 23/13 28/9 31/12 31/14 31/23 32/22 38/4 38/24 39/3 40/23 42/7 42/8 42/8 42/8 42/11 43/1 43/3 44/19 45/8 45/19 46/20 47/20 49/17 50/11 50/22 50/25 51/8 52/11 52/17 55/7 55/8 55/16 55/23 56/3 60/17 60/22 63/22 64/15 64/21 67/10 71/15 71/24 72/9
Hassi [8] 2/11 3/21 28/5 57/19 58/14 59/23 60/12 61/6
Hassi's [1] 55/8
have [145]
haven't [2] 10/22 62/9
having [6] 10/7 11/14 21/7 51/13 56/11 74/3
he [4] 5/4 50/6 54/18 54/20
he's [1] 54/19
heading [1] 48/20
hear [6] 4/13 4/14 4/23 5/16 6/18 53/22
heard [5] 54/17 57/19 59/7 59/25 71/17
hearing [6] 48/18 49/2 49/11 49/25 50/15 65/10
hears [1] 50/2
help [1] 47/22
helpful [1] 38/16
helping [1] 34/21
her [1] 43/2
here [22] 3/22 6/3 19/24 21/17 27/24 31/8 32/7 33/4 35/18 35/21 36/15 36/16 39/3 44/18 53/13 56/20 57/18 61/11 62/23 72/17 73/5 73/16
HERMAN [3] 2/20 75/3 75/10
higher [2] 17/4 45/6
highlight [1] 59/13
his [3] 15/25 16/1 19/14
hold [3] 17/1 30/19 57/12
Honor [89]
Honor's [1] 27/9
HONORABLE [1] 1/10
horizontal [1] 53/24
hours [1] 5/21
house [2] 34/21 48/20
how [25] 4/8 5/1 6/21 8/25 9/21 12/10 13/16 17/21 20/5 20/8 21/2 24/10 24/11 28/16 31/22 36/18 43/21 53/10 54/21 60/16 63/19 63/20 64/9 67/2 69/2
however [1] 6/23
hurdle [1] 31/4

I
I'd [3] 27/4 33/25 59/3
I'll [4] 4/21 6/18 47/17 53/12
I'm [23] 4/12 4/17 5/10 8/7 10/10 11/22 24/13 25/24 26/2 28/5 32/21 34/17 34/18 34/19 36/9 36/13 44/9 46/21 48/19 51/21 54/21 65/2 73/1
I've [6] 4/8 4/9 7/15 37/19 46/25 64/6
i.e [1] 35/7
idea [2] 18/2 43/25
idea that [1] 43/25
ignored [1] 70/23
ignores [1] 18/7
IL [2] 1/21 2/17
illegal [1] 36/7
Illinois [3] 1/19 1/20 3/16
illiquid [1] 15/13
imagine [2] 40/16 50/16
immediate [1] 21/25
immediately [2] 52/20 54/18
impact [9] 33/24 60/5 60/6 60/9 60/9 60/13 60/15 60/17 60/19
important [7] 6/2 23/18 53/13 55/1 57/17 65/25 70/20
impose [2] 22/2 22/3
imposes [1] 10/2
improvements [1] 63/9
inability [1] 15/12
incentive [5] 6/7 23/11 23/13 71/24 72/10
incentives [6] 23/7 23/8 23/10 23/10 24/14 71/23
include [4] 6/21 21/16 22/6 30/21
included [1] 22/5
includes [3] 6/14 14/9 14/9
including [5] 4/10 15/20 46/17 65/11 71/6
inclusion [3] 13/8 68/23 69/1
income [1] 19/1
inconsistent [1] 13/25
incorporates [3] 6/13 7/6 7/7
increased [3] 17/9 28/12 39/4
increases [1] 39/7
increasing [2] 39/6 39/9
incumbered [1] 10/21
indebtedness [2] 22/9 46/1
indeed [2] 26/4 66/7
independent [2] 7/14 66/21
independently [1] 70/9
Indiana [1] 7/25
indicated [3] 29/23 31/14 41/4

I

indicating [1] 32/7
indiscernible [1] 71/21
industry [2] 17/22 28/17
infer [3] 34/9 34/23 34/24
inference [1] 69/6
information [1] 41/12
injunction [10] 1/9 9/11 9/21 10/4 48/18 51/5 51/11 65/19 65/21 65/22
injured [1] 50/19
injury [1] 15/12
input [1] 29/18
inside [1] 41/12
insolvent [2] 35/18 35/23
instance [1] 59/15
instead [4] 19/10 55/3 66/10 68/6
insubstantial [1] 18/22
insufficient [2] 69/21 70/22
intended [1] 68/17
intends [2] 47/2 71/16
intent [2] 23/2 35/24
intentions [1] 27/16
interest [4] 62/3 71/3 73/13 73/20
interested [2] 29/20 65/20
interests [1] 65/21
interfere [1] 73/18
interrogate [1] 63/4
introduce [1] 3/9
introduction [1] 58/13
invade [2] 43/16 43/16
invest [3] 17/11 28/19 43/5
invested [1] 42/7
investment [2] 16/20 16/25
investment-grade [1] 16/20
iota [1] 43/3
irreparable [5] 65/19 66/1 72/21 72/24 73/4
is [317]
isn't [6] 10/20 14/3 14/3 19/12 21/3 31/3
isolate [1] 37/20
issue [17] 9/21 10/4 27/17 29/24 31/20 31/21 37/21 39/25 40/10 42/1 52/21 53/3 53/4 53/5 53/24 72/15 74/2
issues [2] 27/14 41/12
issuing [1] 52/19
it [229]
it's [73] 6/3 6/12 10/17 11/19 12/11 12/15 12/15 12/24 14/2 14/12 15/24 16/2 16/2 17/17 18/15 22/9 22/16 23/14 23/20 24/9 24/10 24/11 24/12 25/3 25/5 25/18 25/23 26/18 28/12 30/9 30/10 31/15 31/16 31/21 33/8 37/24 38/24 42/22 45/7 45/23 45/23 46/7 46/9 46/10 47/9 47/25 48/1 48/13 49/11 49/14 50/17 50/25 53/12 53/13 54/22 57/17 59/5 59/5 59/16 59/17 59/18 60/11 60/23 60/24 61/18 62/4 62/7 62/17 63/21 64/3 64/15 64/17 73/15
its [43] 6/1 6/1 13/8 14/13 16/8 16/19 18/5 18/10 18/11 24/17 25/4 28/11 35/6 36/8 36/10 37/13 39/1 42/6 42/8 42/8 42/11 43/14 46/4 46/15 46/16 46/17 50/12 53/20 60/22 63/1 63/2 63/23 66/12 66/22 67/25 68/10 69/1 70/13 70/14 70/15 70/17 71/12 72/10
itself [4] 25/19 28/24 42/7 59/9

J

Jason [1] 2/7
JENNER [3] 2/16 3/23 34/21
Jessie [2] 1/15 3/14
jewel [1] 46/11
job [1] 19/14
joint [1] 26/20
judge [6] 1/10 49/11 50/1 50/1 50/3 50/8
Judge Schubert [1] 49/11
judging [1] 34/3
judgment [3] 19/18 19/20 56/6
July [1] 40/8
jumping [1] 44/18
juncture [1] 57/4
June [1] 41/2
just [33] 4/25 8/7 14/18 15/6 17/17 19/10 21/15 25/24 29/5 32/8 33/21 37/3 37/20 38/7 39/25 40/1 42/9 42/14 43/6 45/20 45/21 46/24 47/13 47/19 48/12 49/21 54/2 55/11 57/21 59/17 59/22 61/17 64/3
Justice's [1] 27/6

K

Kathleen [2] 1/15 3/14
KAYE [1] 2/8
keep [2] 10/10 33/25
keeping [1] 51/8
Kettle [2] 40/14 40/15
kick [1] 38/9
kind [1] 20/2
King [1] 48/24
knew [1] 59/18
know [37] 5/4 5/12 12/17 12/23 12/24 13/15 17/3 19/2 19/3 19/7 19/10 20/15 20/15 21/22 22/24 22/24 22/24 23/12 24/19 25/7 26/15 34/16 36/9 36/19 46/20 48/4 48/11 48/24 49/6 49/8 50/2 50/5 50/16 50/22 59/5 62/4 64/9
knowable [1] 11/11
knowing [1] 67/4
knows [2] 12/13 43/18
Konopka [2] 1/15 3/14
KROGER [35] 1/6 3/4 4/5 6/2 24/24 25/1 28/24 28/25 29/23 30/14 31/23 41/5 42/9 44/24 45/2 45/17 46/3 46/4 58/8 61/10 61/12 61/14 66/16 66/20 67/4 67/8 67/16 67/24 68/12 68/17 68/19 69/10 71/23 72/1 72/4
Kroger's [10] 2/2 11/20 11/22 29/18 40/2 46/8 52/8 56/3 68/3 68/15
Krogers [10] 11/25 12/14 21/7 23/10 29/7 37/5 40/16 55/16 55/21 55/23
Krogers' [1] 55/15
Kuester [1] 2/7

L

lack [3] 10/9 47/1 47/16
laden [1] 44/25
laid [2] 23/16 53/18
largely [1] 38/15
last [14] 15/24 22/22 28/11 28/13 30/6 32/23 36/19 39/2 42/7 45/14 49/2 56/10 60/23 71/6
late [1] 40/8
later [1] 12/16
Lauren [1] 1/23
law [26] 7/13 7/21 7/23 7/24 8/5 8/11 8/15 8/19 10/7 10/8 19/13 20/5 33/5 36/11 41/11 43/8 43/10 43/11 43/13 51/1 51/7 59/14 66/7 66/9 66/12 70/11
lawful [3] 33/12 35/4 59/9
laws [6] 8/13 8/17 16/4 22/25 26/24 59/18
lawyer [7] 9/6 34/18 34/20 41/14 41/14 47/19 51/25
lawyers [2] 5/2 44/17
lay [2] 53/16 65/14
lead [1] 3/18
Leah [2] 2/11 3/24
least [13] 5/12 6/7 8/3 10/24 22/2 29/8 31/3 32/22 35/9 51/10 51/19 71/18 73/21
leave [1] 58/16
leaves [1] 62/13
led [1] 64/13
legitimate [2] 58/18 58/20
lending [2] 48/6 71/19

L

Lesley [1] 65/6
less [5] 16/11 18/3 18/4 55/24 64/16
lessening [2] 37/7 73/3
lesser [1] 17/24
let [10] 12/8 22/11 25/9 49/7 49/8 53/12 55/11 60/20 61/17 65/6
let's [5] 5/16 15/5 33/4 33/4 34/11
level [1] 38/5
levels [1] 17/12
leverage [1] 42/16
leveraged [1] 17/23
levered [1] 45/1
liabilities [2] 18/15 22/8
liability [10] 8/21 9/1 10/11 10/21 11/3 50/11 50/23 51/13 51/20 60/11
LIBOR [2] 19/7 62/7
lieu [1] 61/13
light [2] 73/7 73/24
lights [1] 49/1
like [18] 4/14 7/25 8/7 10/14 16/23 26/25 30/25 33/20 33/25 35/19 39/17 51/10 52/6 52/8 59/4 61/22 62/4 63/10
likelihood [5] 65/18 65/25 66/4 72/20 73/9
likely [5] 4/15 4/16 20/17 56/12 73/3
likely to [1] 56/12
limit [1] 27/23
limitations [1] 38/8
line [6] 27/13 33/21 47/9 48/1 48/1 71/17
liquid [2] 17/1 18/4
liquidity [25] 9/8 9/18 15/14 18/10 18/14 19/4 19/22 22/1 28/11 28/14 33/23 33/24 38/24 39/2 39/3 47/10 51/23 60/9 60/25 61/19 62/2 62/14 63/6 70/22 71/13
litigation [2] 4/1 11/7
little [5] 20/15 22/16 39/7 44/11 49/12
LLP [4] 2/3 2/8 2/12 2/16
loading [1] 46/7
long [8] 12/24 26/16 27/14 30/10 48/25 68/8 68/16 73/22
long-standing [1] 73/22
longer [2] 48/4 48/6
longer-term [2] 48/4 48/6
look [16] 12/16 20/5 28/11 29/13 29/16 30/6 34/5 34/5 38/23 40/4 41/17 41/20 53/19 61/4 61/18 62/17
looked [1] 28/14
looking [4] 14/11 14/12 20/6 20/7
looks [1] 17/21
loop [1] 49/12
LORRAINE [3] 2/20 75/3 75/10
Los [1] 1/25
loss [1] 17/8
lot [4] 24/17 37/20 44/15 73/16
Louise [1] 1/19
love [1] 39/15
lower [1] 29/25

M

made [12] 11/24 11/25 13/14 13/14 50/12 51/7 54/10 55/2 57/6 64/13 68/13 68/16
magnitude [1] 19/22
main [1] 25/4
maintain [2] 50/7 68/9
make [22] 4/24 12/7 12/21 13/1 14/7 15/6 17/8 21/16 21/18 27/21 34/13 44/17 44/20 47/13 56/4 56/14 57/8 57/17 60/1 66/18 72/3 72/13
makes [3] 35/6 56/6 67/4
making [4] 8/7 50/7 53/9 59/17
management [1] 41/15
MANGES [1] 2/3
many [1] 63/24
margins [1] 17/10
Margrabe [2] 1/13 3/14
market [4] 17/18 18/21 62/4 62/7
market-determined [1] 62/7
markets [13] 42/19 42/21 42/22 42/24 44/23 45/19 46/2 46/13 46/19 48/7 50/24 72/2 72/3
Martin [2] 2/11 3/24
Massachusetts [1] 2/8
matter [18] 4/19 10/6 10/8 16/2 26/16 26/21 33/5 42/23 43/12 48/23 49/23 51/1 51/6 59/9 64/1 71/23 73/16 75/5
matters [3] 24/22 63/19 64/12
Matthew [2] 2/6 4/4
Maxeiner [2] 1/19 3/6
maximum [2] 12/11 29/9
may [20] 5/9 17/11 30/7 30/7 31/21 38/15 40/19 40/19 42/23 49/3 49/3 52/1 52/1 58/14 59/14 60/14 64/10 70/12 71/12 72/9
maybe [2] 32/19 49/21
McCollam [1] 68/7
McCollam's [1] 62/5
me [27] 3/13 3/22 4/5 6/18 8/4 8/20 12/14 16/10 22/11 22/16 25/18 33/20 38/2 44/7 45/4 48/12 49/12 51/17 52/3 55/11 60/1 60/20 61/17 68/22 72/4 73/15 73/25
mean [14] 7/2 14/4 20/18 21/6 21/10 23/23 31/25 32/1 32/3 32/16 39/15 43/2 58/18 64/6
meaning [1] 29/7
means [2] 8/16 14/6
meet [2] 48/21 71/12
meeting [3] 28/23 29/12 49/5
memorialized [1] 26/17
memorializes [1] 26/7
mentioned [1] 39/24
merge [1] 28/24
merger [106]
merits [5] 65/18 66/1 66/5 72/20 73/10
methods [1] 70/16
Michael [3] 2/6 5/3 15/19
mid [1] 40/8
middle [1] 40/4
might [11] 6/21 27/12 34/15 34/17 38/4 38/9 40/8 40/15 43/23 43/24 50/16
Millerchip [1] 68/15
million [7] 18/9 19/9 25/6 46/2 46/3 46/24 62/23
millions [1] 50/17
minute [2] 33/5 36/19
missed [1] 42/2
missing [1] 9/5
moment [1] 59/5
Monday [2] 41/24 50/21
money [5] 10/18 17/5 24/17 50/21 60/10
months [2] 21/7 28/8
more [17] 12/14 17/1 17/11 17/22 20/16 25/6 41/18 46/3 52/3 55/21 57/15 62/23 69/5 69/14 70/16 70/18 70/20
Morgan [2] 31/12 35/11
morning [2] 43/25 54/17
most [3] 5/10 62/5 72/2
motion [6] 4/17 56/17 57/7 65/2 65/13 74/1
motive [1] 34/9
mouth [1] 32/17
Mr [1] 56/10
Mr. [9] 5/17 50/10 51/3 55/8 57/19 58/14 59/23 60/12 61/6
Mr. Gitlin [3] 5/17 50/10 51/3
Mr. Hassi [5] 57/19 58/14 59/23 60/12 61/6
Mr. Hassi's [1] 55/8
Ms. [2] 62/5 65/6
Ms. Lesley [1] 65/6
Ms. McCollam's [1] 62/5
much [10] 12/10 19/22

M

much... [8] 25/7 28/1 31/22 45/6 45/6 52/13 53/10 62/8
must [4] 12/21 13/1 13/6 24/1
my [34] 3/11 3/24 3/25 4/21 8/9 27/13 32/23 35/24 40/15 44/7 44/10 44/16 47/17 47/19 48/5 50/5 52/4 52/17 52/18 53/17 55/7 57/17 60/2 61/23 64/3 65/14 66/2 71/23 72/15 72/19 72/22 73/6 73/7 73/12

N

name [2] 3/11 47/1
near [2] 25/21 25/22
near-term [2] 25/21 25/22
necessarily [3] 11/2 14/6 26/2
necessary [3] 42/20 46/13 71/22
need [12] 4/18 14/16 20/15 42/21 44/1 46/18 57/3 63/10 63/11 63/15 63/16 63/16
needed [2] 53/16 67/6
needing [1] 64/17
needs [5] 18/10 18/14 19/4 63/6 71/13
negative [1] 24/5
negatively [1] 21/8
negotiated [8] 13/7 13/8 20/22 21/1 26/8 26/14 58/9 61/14
negotiations [1] 30/24
neither [2] 69/4 71/23
net [8] 11/20 18/22 19/1 42/15 45/2 63/17 63/23 70/17
never [7] 10/19 30/14 35/18 36/11 60/23 60/24 68/4
new [2] 3/23 73/22
next [2] 72/10 72/21
nicely [1] 45/1
NICHOLS [1] 1/10
night [1] 30/6
no [35] 1/3 4/19 7/15 7/15 7/19 9/3 11/22 11/23 11/24 11/25 20/12 20/12 23/11 23/13 24/13 25/15 26/10 30/2 33/7 35/17 42/20 47/4 47/9 53/8 55/16 55/17 56/3 56/13 60/17 60/25 62/11 64/3 66/19 67/25 72/9
non [3] 16/25 54/23 72/15
non-agreement [1] 54/23
non-investment [1] 16/25
non-issue [1] 72/15
normal [3] 21/15 21/24 21/25
North [1] 2/16
not [164]
not-so-subtle [1] 54/11
note [3] 6/2 38/7 70/4
noted [2] 68/11 70/9
nothing [7] 60/7 62/14 64/23 67/21 74/5 74/8 74/9
notification [1] 10/1
November [4] 1/5 28/13 28/21 75/10
now [20] 6/7 8/19 10/7 16/13 17/5 17/8 21/7 25/16 26/18 33/19 35/16 40/12 40/21 40/21 42/23 46/4 51/11 53/11 54/1 62/17
number [5] 11/5 37/11 37/17 40/10 40/23
numbered [1] 40/24
numbers [3] 38/3 38/3 40/22
numeral [1] 45/15
numerous [1] 7/24
NW [5] 1/16 2/3 2/8 2/12 2/21

O

oblig [1] 14/7
obligate [2] 12/7 56/4
obligated [7] 14/7 14/23 14/25 26/4 30/14 34/15 68/25
obligated to [1] 34/15
obligates [1] 67/22
obligating [1] 67/19
obligation [3] 9/10 10/2 26/10
obligations [2] 26/13 59/15
oblique [1] 56/15
obliquely [1] 57/13
obtained [1] 27/8
obvious [1] 36/24
obviously [8] 11/16 15/18 20/16 20/19 29/20 48/16 65/23 73/16
October [3] 22/22 28/22 50/13
OFC [3] 1/16 1/20 1/23
off [4] 18/9 32/2 35/19 42/4
offer [5] 39/22 41/7 41/10 61/7 61/9
Official [2] 2/20 75/3
Okay [6] 7/12 12/6 15/5 56/7 64/24 74/10
once [2] 7/18 7/19
one [44] 4/23 4/24 5/2 5/3 7/8 8/7 11/8 12/8 12/13 16/15 17/22 19/5 21/9 21/23 25/4 25/14 26/22 29/3 36/13 36/22 36/25 36/25 40/10 40/12 43/3 43/20 45/13 46/22 48/10 49/23 52/18 53/11 53/13 55/11 56/16 58/18 58/20 59/10 60/21 61/1 63/15 64/7 66/13 72/19
ones [2] 34/21 50/18
ongoing [1] 46/17
only [9] 5/21 11/18 17/17 23/19 25/4 27/4 55/3 55/20 72/2
opening [4] 53/20 54/3 54/12 57/7
openings [1] 17/14
openly [1] 52/20
operate [4] 36/17 44/20 45/12 45/13
operating [3] 18/25 19/1 70/24
operative [1] 53/20
opinion [5] 5/2 5/11 8/13 14/1 21/22
opportunity [3] 5/22 27/2 52/10
oppositions [1] 54/1
option [1] 55/23
options [5] 40/7 40/20 61/4 61/6 61/14
orally [4] 4/18 65/2 65/4 65/13
order [17] 5/25 19/1 27/7 27/18 48/16 49/16 57/1 57/5 57/20 60/18 65/14 65/16 68/25 73/14 74/1 74/2 74/2
orders [1] 7/20
ordinarily [1] 50/2
ordinary [7] 33/12 33/16 44/14 44/21 44/22 45/12 46/15
other [38] 3/8 5/4 7/7 7/9 13/10 13/22 14/9 17/23 20/14 20/16 20/20 21/24 22/6 25/6 26/6 26/8 26/13 27/11 27/23 36/23 37/9 46/20 48/7 49/15 53/11 56/15 59/3 61/13 62/6 62/25 63/17 64/8 64/10 65/20 69/8 71/15 73/6 73/16
others [1] 17/11
otherwise [6] 6/22 6/22 8/8 69/1 69/20 69/23
our [27] 5/20 6/3 8/12 14/10 15/1 15/12 15/16 17/19 22/22 23/17 28/16 29/14 38/18 40/20 43/25 48/24 49/2 50/12 51/6 51/7 52/21 53/4 53/5 54/1 57/6 57/8 58/11
out [20] 10/22 11/11 22/8 22/8 23/16 25/16 26/11 39/11 41/24 42/9 43/24 49/1 50/18 50/25 51/21 53/16 53/18 54/1 65/14 70/14
outset [2] 39/3 41/5
outside [3] 33/15 44/21 45/13
over [13] 28/11 30/9 31/4 39/2 39/6 41/25 41/25 42/15 42/15 48/20 52/24 61/19 63/6
overall [1] 31/10
overlap [1] 72/3
overpaying [1] 67/8
own [5] 36/8 36/10 39/15 59/17 72/10

O
owners [1] 24/18
P
p.m [3] 1/6 65/5 65/5
page [8] 30/6 40/23 41/20 44/12 45/23 53/21 53/25 61/5
pages [2] 30/9 57/7
paid [13] 7/20 10/22 11/20 24/17 29/4 31/2 41/24 42/8 50/14 58/3 60/16 62/13 67/3
paid this [1] 29/4
pairing [1] 22/9
papers [10] 4/9 5/22 30/6 31/8 31/11 35/13 43/21 44/8 53/19 55/2
paragraph [4] 55/4 56/16 57/13 68/19
paragraphs [1] 15/24
parallel [1] 14/17
paraphrasing [1] 11/23
parent [1] 45/16
part [15] 15/3 21/2 21/4 24/20 36/3 39/10 39/20 45/14 47/2 47/10 49/25 56/19 59/20 61/12 66/3
parte [2] 49/7 49/25
particular [4] 12/8 21/22 21/23 30/15
particularly [2] 63/21 73/7
parties [45] 4/11 6/8 6/19 7/16 10/2 12/1 12/2 12/4 13/4 13/5 13/7 14/5 14/8 14/13 14/16 14/22 14/24 15/7 20/23 21/1 21/11 21/16 22/14 22/18 22/24 25/25 26/21 27/18 27/20 27/21 29/7 30/11 30/22 31/2 32/13 33/14 37/10 48/17 58/21 65/12 65/20 68/4 68/24 72/13 73/16
parties have [1] 12/1
parties' [6] 13/25 23/2 23/3 23/7 65/10 65/11
partner [1] 5/3
party [3] 29/20 40/13 65/16
passed [1] 51/8
past [3] 29/4 42/6 49/2
path [1] 61/10
Paul [3] 1/19 2/18 3/6
Paula [2] 1/23 3/6
pause [1] 65/8
pay [64] 6/24 10/18 11/15 11/21 12/14 13/6 13/13 13/13 13/20 13/23 14/23 14/25 15/9 20/11 20/21 26/4 30/3 30/7 30/15 30/15 32/1 32/2 32/13 37/6 37/9 37/10 38/25 39/11 42/19 43/4 46/16 47/23 47/23 48/2 51/2 51/13 51/18 51/19 52/23 54/4 54/6 54/7 58/21 61/2 61/24 63/14 66/16 66/20 67/14 67/17 67/20 67/23 67/24 68/5 68/9 68/17 68/20 68/25 69/19 69/19 70/13 71/16 72/6 73/23
paying [9] 5/25 9/22 18/2 41/23 42/12 49/19 60/3 61/13 70/1
payment [41] 6/4 7/13 8/6 8/10 11/17 11/21 11/24 11/25 12/3 12/8 12/16 12/21 13/2 14/6 14/7 24/2 27/22 32/13 45/3 45/4 49/16 52/2 56/4 57/1 57/6 63/24 66/6 66/8 66/10 66/25 67/5 67/25 67/25 68/13 69/17 70/4 70/7 70/21 73/2 73/11 73/17
payment of [1] 45/3
pays [3] 55/17 55/17 63/20
pendency [7] 6/15 9/19 24/23 25/3 32/5 69/23 71/25
pending [2] 16/8 32/10
Pennsylvania [1] 2/12
penumbra [1] 54/20
people [1] 50/19
per [2] 25/8 29/2
percent [1] 19/8
perfectly [2] 58/18 59/9
perform [1] 43/21
perhaps [3] 11/11 19/20 27/18
period [3] 16/14 41/1 72/5
permissible [1] 23/1
permissive [2] 31/21 33/9
perspective [6] 23/6 27/12 37/19 37/21 74/4 74/7
Pfaffenroth [2] 2/7 4/6
phone [6] 1/19 1/19 1/23 2/15 2/15 2/18
Pl [2] 49/11 49/18
pick [1] 37/11
picked [2] 50/3 50/9
piece [4] 26/11 26/14 32/23 49/12
place [3] 10/3 12/23 12/25
placed [1] 33/13
placeholder [1] 33/18
places [3] 6/5 12/12 38/7
plaintiff [6] 1/18 1/22 30/5 35/17 42/18 43/15
plaintiffs [41] 1/4 1/13 3/5 3/10 3/18 4/13 4/15 4/23 4/25 5/15 5/16 5/24 8/8 26/10 30/19 31/8 32/7 38/20 42/2 44/10 48/11 49/8 52/9 53/16 58/1 66/6 66/15 66/23 69/8 70/10 70/20 70/23 71/20 72/12 72/17 72/19 72/22 73/2 73/8 73/9 73/12
plaintiffs' [11] 30/13 44/12 54/11 57/18 58/1 65/13 66/2 69/13 69/25 74/1 74/4
plan [8] 4/8 4/13 40/7 43/3 43/3 46/14 46/18 67/12
planned [1] 11/21
please [1] 3/9
pleased [1] 34/1
plenty [1] 7/17
PLIMPTON [2] 2/12 3/22
plus [2] 19/7 62/7
point [24] 8/16 9/5 9/7 10/5 10/6 10/20 19/8 22/24 26/23 30/12 30/13 32/18 35/24 40/19 40/17 40/17 41/8 42/24 46/14 53/11 53/12 57/11 64/14 72/15
pointed [1] 54/1
points [3] 56/10 59/3 66/21
policy [1] 8/1
poor [1] 66/18
PORTER [3] 2/8 4/5 5/4
portion [1] 58/13
position [23] 4/17 7/12 8/4 10/23 11/17 13/3 13/5 13/19 14/4 15/1 20/19 22/20 23/5 51/12 55/15 55/16 58/2 59/10 61/21 63/13 63/16 65/1 70/10
positions [2] 62/21 63/2
possibility [1] 72/12
post [3] 29/21 30/24 61/25
post-closing [1] 29/21
post-dividend [1] 61/25
post-signing [1] 30/24
potential [3] 27/14 40/13 69/6
potentially [1] 25/7
practical [1] 14/13
pre [1] 66/20
pre-closing [1] 66/20
precedent [1] 7/3
precedents [1] 7/25
precise [2] 25/20 46/23
preclosing [23] 5/18 6/24 12/7 12/9 12/18 15/9 54/4 66/7 66/9 66/11 66/17 67/1 67/6 68/17 68/20 68/23 69/17 69/19 69/20 70/21 71/14 73/3 73/12
precluded [1] 49/19
precomplaint [1] 22/23
predicting [1] 49/13
prefer [1] 29/24
preliminary [2] 1/9 48/18
premerger [1] 10/1
prepared [4] 4/21 40/2

P
prepared... [2] 41/16 65/12
present [6] 2/18 3/5 3/7 4/13 49/10 51/10
presentation [2] 60/20 61/16
presented [3] 15/18 41/3 41/16
presently [2] 47/14 51/14
preserve [1] 21/18
president [3] 68/3 68/7 68/15
press [6] 30/25 34/9 36/2 66/24 67/9 69/5
pressure [1] 17/9
pretty [7] 4/12 4/19 12/24 18/6 43/22 48/25 50/6
prevents [1] 9/22
previously [1] 62/10
price [9] 11/20 12/17 34/12 52/23 55/25 67/3 67/15 68/12 69/3
primary [1] 66/23
principal [1] 46/1
prior [4] 41/4 45/16 46/4 48/24
private [1] 24/18
privilege [1] 3/15
probably [3] 4/19 5/6 10/8
probate [1] 50/2
problem [4] 5/14 25/15 25/22 27/12
problems [1] 15/14
procedural [2] 53/11 53/12
procedure [1] 49/23
proceed [1] 4/8
proceedings [2] 2/24 75/5
produced [1] 2/25
products [1] 17/13
Professor [2] 33/22 71/7
prohibiting [1] 73/17
project [2] 6/8 71/8
projected [2] 40/22 71/13
projections [2] 62/18 62/19
projects [1] 63/5
promise [3] 27/22 50/12 51/7 51/8 51/18
promising [1] 28/18
promotional [1] 17/12
prong [2] 72/19 72/23
proof [1] 72/23
properly [2] 8/14 9/25
proposition [2] 7/22 39/14
protected [1] 33/15
protecting [1] 9/23
prove [2] 9/2 19/17
provide [2] 49/6 49/8
provided [1] 59/24
provides [1] 70/12
provision [6] 21/13 25/12 45/20 46/23 46/24 48/5
provisions [8] 6/14 8/15 14/10 31/18 47/14 56/16 56/19 57/8
public [7] 16/1 28/9 34/11 34/14 41/11 65/21 73/13
publicly [2] 28/21 50/17
publicly-traded [1] 50/17
pulling [1] 35/10
purchase [6] 52/23 55/25 67/2 67/15 68/12 69/2
purported [1] 53/22
purportedly [1] 55/5
purpose [5] 22/19 32/24 35/6 35/24 58/12
purposes [3] 8/9 31/5 51/10
pursuant [1] 8/14
pursuing [1] 7/10
pushed [2] 29/19 49/3
put [12] 13/4 14/16 15/7 15/10 17/6 18/6 32/17 33/18 37/2 46/7 56/13 57/13
putting [2] 23/4 44/10

Q
qualify [1] 35/15
quality [2] 17/12 17/13
quarters [2] 71/1 71/6
question [19] 8/3 12/22 16/3 19/12 19/15 19/24 22/12 26/23 33/7 37/2 37/20 43/9 46/22 48/10 48/13 48/14 61/17 64/3 64/3
questionable [1] 16/2
questioning [1] 50/10
questions [7] 27/9 30/13 34/8 46/20 52/12 57/24 64/21
quite [5] 10/18 28/9 42/22 56/20 60/14
quo [5] 9/25 21/18 49/15 50/7 50/10
quote [1] 68/19

R
raise [11] 6/6 6/22 9/9 10/14 11/14 40/13 51/4 51/5 58/4 69/21 72/17
raised [2] 11/6 72/12
raising [1] 6/15
ran [2] 43/10 43/11
rate [3] 19/7 62/3 62/4
rather [1] 69/2
ratings [2] 16/20 16/25
ratio [3] 45/3 63/17 63/23
reach [2] 6/24 12/11
reached [4] 6/19 37/5 59/6 61/12
read [2] 5/2 5/22
real [1] 50/18
realize [1] 17/23
really [10] 8/3 19/2 19/3 26/21 31/9 31/9 48/13 51/21 60/25 73/15
reason [10] 5/13 11/18 16/24 22/17 39/10 50/22 60/22 62/8 62/12 62/19
reasonable [3] 56/20 63/14 63/17
reasons [5] 8/6 11/11 31/6 65/15 72/25
rebut [2] 52/10 53/12
rebuttal [2] 4/15 27/3
rebutted [1] 15/22
recall [1] 54/13
recent [1] 45/9
recess [5] 4/16 4/19 65/1 65/4 65/5
recession [4] 43/18 43/19 43/21 43/25
recognize [2] 30/5 31/14
recognized [2] 42/4 68/11
record [10] 3/9 4/12 29/22 39/10 42/6 50/13 65/11 68/22 72/1 75/5
recorded [1] 2/24
recusal [1] 5/14
redacted [1] 16/1
redone [1] 42/8
reduce [1] 6/6
reduced [1] 20/6
reduction [3] 16/8 19/25 20/8
refer [3] 31/18 44/9 57/9
reference [2] 55/3 56/15
referenced [1] 12/11
referring [1] 58/14
refers [1] 31/17
refinance [3] 6/21 6/22 47/16
refinancing [2] 25/5 45/24
refining [1] 45/25
reflect [2] 29/22 68/24
reflected [2] 18/10 62/22
reflecting [1] 61/25
reflection [1] 61/20
reflects [5] 30/8 41/17 58/15 61/18 62/2
regarding [3] 6/19 53/10 70/7
regardless [2] 25/2 68/18
regulators [1] 72/9
regulators' [1] 72/18
related [2] 41/13 54/16
relating [1] 69/11
relationship [2] 5/8 48/14
relative [1] 63/17
release [6] 30/25 34/10 36/2 66/24 67/9 69/5
relevance [1] 68/22
reliance [1] 73/23
religiously [1] 48/25
rely [2] 65/12 69/8
remain [2] 38/4 38/5
remarks [1] 54/3
remember [2] 20/4

R

remember... [1] 23/18
reply [3] 5/20 23/17 54/14
report [1] 15/10
Reported [1] 2/20
Reporter [2] 2/20 75/3
reports [1] 24/19
represent [1] 3/12
representation [1] 39/1
represented [2] 14/24 72/16
representing [2] 3/15 3/24
request [2] 53/4 53/15
require [5] 5/7 54/5 66/25 67/25 67/25
required [3] 10/9 67/16 68/5
rereading [1] 27/5
research [1] 17/19
reserve [2] 50/25 52/25
reserved [1] 25/5
resolve [2] 35/20 35/20
respect [19] 9/10 11/14 26/22 27/8 27/22 34/4 34/4 34/7 41/12 55/22 57/6 59/7 61/15 61/16 62/5 64/6 64/8 64/10 65/24
respected [1] 70/6
respectfully [1] 57/1
respective [1] 54/1
respond [2] 57/14 63/11
response [4] 15/15 15/16 52/21 57/12
responsibilities [1] 46/17
rest [2] 16/15 55/9
restaurants [1] 43/24
rested [1] 54/4
restrain [1] 69/23
restraining [9] 5/24 27/7 49/16 56/25 57/5 65/14 65/16 73/14 74/1
restrains [1] 54/15
restrict [5] 6/15 7/10 30/22 58/3 69/20
restricted [1] 58/4
restriction [1] 45/24
restrictions [9] 6/5 7/7 8/6 13/10 17/7 26/9 33/13 58/10 58/22
restrictive [1] 14/9
rests [1] 68/20
result [10] 14/21 18/2 18/22 24/2 43/4 50/3 70/2 70/23 71/12 73/3
results [1] 61/10
retail [1] 17/21
retraining [1] 27/18
return [7] 29/3 36/18 39/22 40/19 43/13 66/22 68/8
returned [3] 29/3 39/17 43/6
returning [3] 28/15 29/13 41/6
returns [1] 28/18
reveal [1] 58/15
revenue [3] 18/9 18/23 71/9
revenues [6] 18/13 18/25 19/3 28/8 63/9 70/24
review [26] 6/16 9/19 9/25 10/3 16/8 21/20 24/23 25/3 25/18 26/20 28/15 28/20 28/22 32/10 36/3 36/4 36/17 39/11 39/20 39/21 69/24 71/25 72/5 72/11 72/14 72/19
reviewed [5] 4/9 4/9 41/16 70/3 70/5
revolving [2] 19/6 60/4
rid [1] 43/23
right [43] 7/18 9/24 10/12 10/12 11/5 11/7 11/10 11/23 12/5 12/13 16/14 16/18 18/1 18/19 20/18 24/22 25/5 27/21 31/10 31/24 33/4 33/19 39/18 44/19 44/24 46/12 47/12 47/12 47/20 47/21 50/24 54/19 55/19 55/25 56/2 56/4 56/5 57/4 61/25 62/1 63/5 63/7 67/25
rights [2] 52/25 55/21
rolling [1] 71/1
Roman [1] 45/15
Room [1] 2/22
rose [1] 70/25
roughly [2] 27/7 41/1
row [1] 3/25
RPR [1] 2/20
Rudolph [1] 1/20
rule [4] 4/17 4/21 5/6 65/12
rules [1] 10/9
ruling [1] 4/22
rundown [1] 46/10

S

Sachs [1] 70/5
Safeway [1] 31/12
said [14] 23/22 27/2 28/14 29/13 35/9 35/13 35/17 39/2 52/21 55/13 60/12 60/14 64/25 74/3
sake [1] 34/14
salaries [1] 63/10
same [22] 9/13 10/1 10/13 10/18 19/23 20/23 22/1 22/6 26/14 34/12 36/5 36/21 36/22 41/1 45/9 48/3 49/25 51/16 51/24 58/7 59/21 72/25
sat [1] 39/11
satisfy [2] 72/22 73/8
saw [4] 35/16 48/16 54/10 61/22
say [19] 6/11 8/9 11/1 17/7 22/3 22/15 23/9 23/21 30/19 32/11 32/12 32/18 32/19 38/19 43/1 47/14 55/4 58/14 59/8
saying [7] 15/11 26/2 27/18 34/3 34/9 35/8 51/3
saying is [1] 35/8
says [14] 7/19 12/10 12/25 22/7 31/21 33/8 33/8 34/10 39/3 40/4 45/12 45/16 54/20 62/5
scales [1] 65/23
scheme [2] 35/1 35/3
SCHOLER [1] 2/8
Schubert [2] 49/11 50/8
scienter [1] 9/2
se [1] 25/8
seal [1] 38/16
sealed [1] 38/19
second [15] 3/25 4/23 16/3 19/19 26/22 29/1 31/15 39/24 40/1 44/7 45/20 56/13 57/22 68/2 69/18
second-guessing [1] 19/19
secondly [1] 52/24
section [23] 6/25 7/3 7/4 7/14 21/9 26/19 30/21 31/4 33/21 43/11 44/4 44/11 45/11 45/14 53/21 54/13 56/19 57/13 58/5 66/11 66/13 69/10 69/14
sections [1] 53/20
secure [1] 34/17
secured [1] 27/15
securities [4] 11/7 34/20 41/11 41/14
see [8] 5/13 17/2 17/22 21/2 42/6 44/15 44/16 48/3
seek [1] 57/5
seeking [3] 5/24 65/16 67/7
seems [3] 6/17 8/4 52/3
seen [2] 7/15 64/6
sell [1] 28/24
seller [3] 33/15 44/19 44/20
senior [3] 15/11 68/3 68/15
sense [9] 5/10 9/2 18/14 20/18 21/4 56/6 60/1 67/4 72/3
separate [3] 10/2 25/16 26/11
separately [1] 70/8
September [2] 71/1 71/5
sequencing [1] 61/11
sequestered [1] 60/18
series [1] 6/19
serve [1] 18/10
served [1] 70/6
service [2] 17/12 17/12
set [4] 46/11 48/17 48/23 60/24
seven [1] 43/1
several [7] 31/7 31/7 39/2 42/7 45/6 61/23 62/1

S

shall [1] 15/9
shape [1] 30/14
share [2] 28/25 29/2
shareholders [20] 6/1 8/22 28/16 28/18 28/19 29/14 39/14 39/17 41/6 43/7 43/14 50/12 50/13 50/15 51/7 60/17 66/17 66/22 68/10 73/22
shareholders' [1] 73/20
shares [4] 39/23 50/18 50/20 70/13
Sharon [1] 68/7
sheet [6] 19/10 22/5 40/23 45/1 60/17 61/4
shelves [1] 17/13
Sherman [1] 66/11
shift [1] 54/11
short [3] 4/15 4/19 29/3
short-term [1] 29/3
shorthand [1] 2/24
should [13] 5/12 5/17 15/2 19/13 19/21 28/15 33/17 36/5 38/5 45/21 46/13 55/2 74/4
shouldn't [3] 22/5 36/1 36/22
show [5] 46/15 69/5 70/20 72/23 73/13
shows [3] 42/13 42/13 72/1
side [2] 15/8 37/3
signed [1] 36/20
significant [2] 52/2 71/2
significantly [2] 17/22 37/13
signing [1] 30/24
similar [1] 10/23
similarly [1] 68/16
simply [2] 7/23 46/7
simultaneously [1] 25/10
since [3] 15/1 23/12 28/10
single [2] 36/3 55/4
singular [2] 36/3 36/4
sit [1] 39/15
sitting [1] 50/23
situation [1] 18/21
slide [8] 38/23 39/24 40/1 40/22 47/11 60/20 61/18 62/17
slides [1] 38/11
slides that [1] 38/11
sliding [1] 65/23
slow [1] 28/17
slow-growth [1] 28/17
smaller [1] 67/24
Smith's [2] 33/22 71/7
so [94]
soften [1] 17/24
solely [2] 54/4 68/21
some [27] 7/20 8/22 9/10 16/6 16/19 16/20 20/2 20/6 23/16 28/16 29/8 30/21 33/20 34/21 38/16 43/6 43/17 49/14 50/16 51/22 57/19 59/6 59/22 60/9 60/12 62/7 69/8
somehow [5] 54/20 54/22 55/1 55/5 56/19
something [6] 21/5 25/7 27/10 29/17 59/25 65/3
sometimes [1] 35/10
somewhat [1] 24/24
Sonia [2] 2/7 4/6
sorry [3] 36/9 45/21 47/5
sort [3] 8/22 38/7 48/6
sought [1] 27/6
sources [3] 33/23 33/24 38/3
South [1] 1/24
speak [2] 49/5 52/9
Speaking [1] 25/10
special [31] 5/25 6/13 19/5 19/21 20/11 20/21 22/3 24/2 25/12 28/15 28/20 29/2 38/25 39/20 40/10 41/19 47/3 52/22 53/21 54/13 54/15 54/22 58/2 58/15 58/21 61/2 61/13 70/1 70/11 70/18 73/19
specific [5] 6/5 6/14 16/15 25/25 58/12
specifically [2] 15/21 17/21
speed [1] 48/12
spending [1] 43/23
spin [1] 18/9
spot [1] 56/11
Spring [1] 1/24
standing [3] 36/8 36/10 73/22
stands [1] 7/22
start [2] 31/11 56/10
started [1] 13/17
starting [2] 28/21 65/5
state [11] 1/19 1/23 7/24 8/1 48/19 49/23 49/24 51/11 54/8 66/12 68/4
state's [2] 9/24 22/13
statement [2] 51/12 51/18
statements [2] 18/11 53/1
states [12] 1/1 1/10 3/15 27/12 30/5 35/17 36/9 42/18 43/15 67/9 68/7 68/16
status [6] 9/25 21/18 49/15 50/7 50/10 72/10
statute [1] 10/1
stay [1] 57/21
steam [1] 21/19
stenotype [1] 2/24
step [2] 21/6 21/12
Stephen [1] 2/14
Steven [1] 3/23
still [16] 6/25 8/21 9/9 9/11 10/22 24/24 25/1 43/19 43/19 43/22 43/24 48/17 49/17 54/21 62/13 70/17
stock [1] 70/14
stop [1] 33/2
store [1] 63/9
stores [9] 17/11 20/3 28/17 28/17 35/11 42/8 43/5 43/20 43/21
strategic [6] 28/20 36/3 36/4 36/17 39/11 39/21
strategy [1] 68/8
Street [5] 1/16 1/20 1/24 2/3 2/16
stress [1] 46/14
strictures [1] 20/15
strike [2] 11/8 11/9
strongly [1] 52/19
struck [1] 11/5
subject [1] 25/18
submitted [2] 4/12 66/23
substantial [9] 18/6 37/7 37/12 37/22 37/24 65/18 65/20 66/4 70/24
substantially [7] 18/3 18/4 23/11 23/13 23/15 23/22 58/23
substantive [1] 48/13
substantively [1] 53/8
subtle [1] 54/11
succeed [1] 56/12
succeeding [1] 65/18
success [3] 66/4 72/20 73/10
successful [1] 65/25
such [11] 21/8 22/4 35/14 36/7 37/12 45/25 46/18 52/22 67/5 68/12 72/18
sued [1] 51/4
suffer [2] 65/19 65/20
suffering [1] 59/16
sufficient [1] 38/24
suggest [2] 18/6 35/12
suggested [1] 71/20
suggesting [1] 18/18
Suisse [2] 62/20 70/5
Suite [2] 1/24 2/3
summarize [1] 53/23
summer [1] 40/9
Sunday [1] 43/2
supermarket [2] 17/21 46/10
supermarkets [1] 46/11
support [1] 69/14
supported [1] 58/19
suppose [1] 49/18
supposed [2] 18/8 54/21
sure [15] 5/11 8/7 16/12 21/16 21/18 24/16 32/21 34/13 44/17 44/20 47/13 48/19 51/21 54/21 57/23
surplus [4] 43/12 70/14 70/15 70/17
surrounding [2] 20/16 30/24

T

table [4] 3/13 3/23 4/6 35/20
take [24] 4/16 4/18

T

take... [22] 7/13 8/13 11/4 11/17 12/18 17/5 21/11 22/7 22/8 26/1 29/14 33/20 35/19 36/1 44/23 57/15 58/17 61/18 62/16 64/25 65/2 69/2
taken [1] 8/4
takes [1] 10/3
taking [8] 3/18 19/5 19/11 33/15 45/7 59/10 71/13 73/24
talk [7] 31/8 33/4 33/12 42/3 42/18 45/20 47/18
talked [2] 40/1 65/23
talking [8] 7/4 7/5 31/11 35/10 37/3 41/19 46/24 48/6
talks [2] 45/11 45/23
tapped [1] 60/24
taxes [1] 71/4
Ted [2] 3/21 28/5
Teeters [1] 31/11
telephone [2] 3/5 3/7
tell [3] 4/20 34/11 35/16
telling [1] 7/16
tells [1] 13/1
temporary [8] 5/24 27/7 56/25 57/5 65/14 65/16 73/13 74/1
tender [5] 39/22 41/7 41/10 61/7 61/9
term [9] 10/10 12/15 21/23 25/21 25/22 29/3 47/6 48/4 48/6
terminology [1] 46/23
terms [12] 18/13 21/24 25/25 26/6 27/23 48/3 49/13 54/16 54/20 54/22 55/1 55/4
test [1] 66/3
text [1] 44/10
than [11] 12/14 25/6 36/23 41/8 41/19 46/3 52/3 55/21 62/23 63/24 70/18
than many [1] 63/24
Thank [20] 3/20 4/3 4/6 5/19 28/1 28/2 38/22 48/9 52/13 52/14 52/15 55/10 56/7 56/8 56/9 64/19 64/24 65/6 74/6 74/10
that [491]
that we [1] 25/14
that's [59] 9/3 9/14 10/3 10/3 10/3 10/12 11/13 12/13 14/17 16/18 16/18 19/8 19/9 21/2 24/20 27/24 27/24 28/16 29/16 29/16 30/8 30/18 31/13 32/6 32/14 33/16 34/23 38/1 38/17 40/11 41/1 41/7 41/23 42/1 42/13 43/15 44/2 44/25 45/17 47/21 49/13 53/25 55/19 56/1 56/5 56/5 57/24 58/6 58/25 59/2 59/6 59/9 60/11 61/20 62/15 67/11 68/19 69/15 73/19
their [65] 9/5 9/7 9/12 10/5 10/6 10/11 10/13 10/23 10/24 15/10 16/20 16/25 17/3 17/13 17/24 18/13 18/14 18/20 19/1 19/4 19/6 19/9 26/5 28/18 29/11 30/7 31/8 31/10 32/17 32/21 32/25 35/13 35/14 39/8 39/12 39/13 41/4 42/2 43/5 43/20 46/12 50/21 53/1 53/16 53/18 53/19 54/8 55/1 55/2 56/5 56/6 57/12 59/15 59/17 60/17 60/20 61/3 61/16 62/2 62/6 64/6 69/15 71/22 72/2 72/22
them [12] 9/22 10/18 16/20 24/19 24/24 28/19 31/3 39/17 44/7 44/17 60/12 60/19
then [20] 4/14 4/20 10/13 20/18 23/14 35/1 37/20 37/23 38/3 40/8 41/16 52/22 52/25 53/1 53/12 59/22 62/16 62/16 71/18 72/6
theory [15] 15/11 18/2 22/14 23/6 23/23 23/25 24/1 32/22 32/25 54/2 54/11 57/18 58/17 58/18 58/20
there [77]
there's [15] 7/3 7/17 7/18 7/20 9/20 15/6 27/13 31/4 32/12 36/10 37/17 40/22 42/19 47/11 59/8
thereby [1] 58/25
therefore [3] 36/6 55/8 60/19
these [30] 19/3 22/2 24/22 30/11 32/4 32/9 36/2 38/14 38/16 38/16 40/24 44/14 44/15 44/16 45/14 50/2 50/16 54/18 54/19 54/25 55/3 57/8 57/24 58/21 62/18 62/18 62/19 65/24 69/9 73/24
they [171]
they'd [1] 27/10
they're [5] 10/12 16/21 38/15 44/1 44/17
they've [2] 45/7 62/9
thing [8] 26/22 26/22 27/4 33/1 33/1 55/11 59/25 60/21
things [6] 20/21 30/21 32/12 35/20 45/8 50/2
think [66] 5/6 5/9 5/17 6/2 7/1 7/16 7/22 8/2 8/10 9/3 9/4 9/5 9/14 9/20 10/6 10/6 10/17 12/12 16/2 16/3 18/12 18/17 18/21 19/8 21/10 22/17 23/16 23/17 24/8 24/9 25/7 25/11 25/20 26/12 31/13 32/11 32/11 32/12 32/16 32/17 32/21 36/14 38/5 39/7 47/25 48/11 49/4 50/9 51/6 56/11 56/18 56/20 56/23 57/17 57/19 58/13 58/17 58/20 59/3 60/14 61/6 61/15 64/5 69/15 69/15 71/22
thinking [2] 9/8 47/6
thinks [1] 59/16
third [2] 31/19 40/13
third-party [1] 40/13
this [111]
those [19] 17/2 21/24 21/24 26/12 26/13 33/20 33/23 33/24 35/9 35/12 40/20 40/20 44/6 48/17 50/15 53/1 54/10 56/15 69/14
though [4] 18/25 21/12 60/3 60/11
thought [5] 5/12 14/4 39/21 40/8 47/12
three [5] 28/11 31/9 40/13 43/3 46/17
three-year [2] 43/3 46/17
threshold [1] 52/24
through [12] 5/4 6/7 16/10 24/25 25/1 31/17 33/20 38/2 57/4 58/4 71/5 73/1
throwing [1] 49/12
throws [1] 42/4
Thursday [4] 48/18 48/23 49/11 49/14
tied [2] 25/3 36/6
time [25] 4/15 4/16 7/5 11/12 16/21 16/24 19/23 20/23 22/1 36/5 36/22 40/17 41/1 41/6 41/8 42/16 44/16 45/9 49/10 55/10 57/15 59/19 61/3 62/21 69/3
timed [1] 19/21
timeline [1] 27/8
times [8] 17/1 17/2 29/23 39/16 39/19 53/9 54/5 71/20
timing [2] 30/25 36/2
title [3] 53/22 54/12 54/14
titles [1] 53/20
today [23] 3/15 3/18 4/8 4/18 4/21 7/9 9/17 9/21 10/4 27/25 31/13 35/21 36/16 41/19 41/24 61/22 61/24 62/1 63/19 64/14 65/10 71/17 74/4
together [10] 6/4 7/8 8/5 16/14 26/8 26/14 26/17 36/6 36/24 57/9
told [3] 41/5 52/18 52/20
tomorrow [2] 7/10 64/16
too [1] 45/1
took [3] 21/6 28/23 36/24
top [1] 39/3

T

total [1] 42/14
totally [3] 14/15 20/7 23/4
tough [1] 56/11
towards [1] 23/17
trade [1] 69/23
traded [1] 50/17
trailing [1] 28/8
transaction [4] 12/17 23/14 68/18 70/3
transactions [3] 6/21 30/23 69/12
transcript [3] 1/9 2/25 75/4
transcription [1] 2/25
transparency [1] 34/14
treating [1] 51/12
Tribune [2] 27/5 27/13
tried [2] 22/23 43/1
triggered [1] 21/8
TRO [14] 9/9 9/13 10/15 51/17 53/14 53/19 53/25 55/2 55/9 60/10 66/2 72/24 73/17 73/21
trouble [1] 64/18
true [5] 51/17 63/5 63/5 64/4 75/4
try [3] 31/19 35/12 44/7
trying [6] 14/14 21/17 21/18 24/13 25/24 46/22
turn [1] 60/20
turned [1] 11/11
turning [1] 57/9
turns [3] 18/2 54/23 54/24
two [26] 15/10 21/7 28/23 29/3 30/11 32/4 32/9 32/11 34/14 35/9 36/2 36/24 36/25 40/12 43/11 53/1 58/9 59/20 66/14 67/7 69/6 70/5 72/5 72/11 73/6 73/8
two-year [1] 72/5
twofold [2] 15/17 52/21
type [1] 34/8

U

U.S [1] 2/21
uh [5] 20/14 30/19 40/2 45/23 46/23
umbrella [1] 25/23
unable [1] 70/2
unaffected [1] 47/14
unanimous [1] 36/25
unavailable [1] 60/12
unclear [2] 22/16 69/13
under [18] 4/18 5/6 7/4 7/24 8/12 8/18 8/25 12/22 13/1 27/11 36/11 38/16 43/7 43/10 47/20 53/14 53/22 65/2
undercapitalized [1] 70/1
underlined [1] 40/12
understand [19] 5/20 8/25 9/7 10/16 14/14 14/18 23/5 24/13 24/19 25/23 25/25 29/5 37/19 39/16 41/13 50/1 57/11 60/16 62/7
understanding [8] 14/10 47/17 47/19 48/5 50/6 52/4 60/2 61/23
understood [3] 57/16 60/1 61/11
undertake [1] 69/11
unfortunately [1] 35/20
unilateral [4] 11/18 29/2 29/6 31/19
unilaterally [3] 20/11 30/17 67/14
uninfected [1] 9/24
UNITED [2] 1/1 1/10
unlawful [13] 11/10 11/13 32/6 32/8 32/8 33/11 35/3 35/5 35/6 36/7 53/7 53/23 56/19
unless [4] 19/17 49/17 52/11 64/21
unlikely [1] 69/15
unnecessary [1] 55/9
unreasonably [2] 45/17 46/5
unrebutted [4] 68/2 68/6 68/14 71/8
until [4] 7/11 36/19 49/17 50/7
unusual [3] 22/4 22/8 22/8
unwritten [1] 14/18
up [12] 9/23 17/8 19/7 26/17 33/21 41/25 42/14 45/8 48/12 50/3 50/10 62/19
update [1] 49/9
upon [2] 29/8 70/13
us [2] 14/24 34/22
use [6] 10/10 30/7 47/21 48/2 58/24 61/1
used [3] 29/6 60/23 63/9
using [5] 39/13 47/22 70/15 70/16 71/14
usually [1] 25/9
usually don't [1] 25/9

V

value [4] 29/21 66/22 69/3 70/17
variety [1] 61/6
various [1] 4/11
vehicle [2] 47/1 48/7
ventures [1] 26/20
version [2] 44/10 44/12
versions [1] 16/1
versus [4] 3/4 10/19 25/17 63/20
very [14] 4/24 5/9 7/16 15/11 22/2 25/20 28/1 29/11 52/13 52/16 57/25 60/15 65/25 74/2
vet [1] 27/16
vetted [1] 41/15
VI [2] 21/9 30/21
via [1] 40/11
vibrant [1] 46/9
Vice [1] 68/15
view [17] 14/19 21/9 21/22 22/18 25/24 26/1 26/15 32/23 37/24 56/3 66/2 71/23 72/15 72/19 72/22 73/6 73/12
viewed [3] 21/7 21/10 33/17
viewed in [1] 33/17
views [1] 33/22
vigorously [1] 70/2
VII [1] 45/15
violate [4] 7/13 7/23 66/7 66/11
violated [1] 26/23
violates [3] 26/19 53/21 54/13
violation [10] 7/21 15/3 15/4 22/10 52/18 53/18 53/23 54/24 55/8 59/1
violative [1] 55/5
virtue [1] 60/18
voluntarily [1] 27/16
voted [2] 28/24 29/1
votes [2] 36/24 36/25
VP [1] 68/3
vs [1] 1/5

W

Wait [1] 56/13
waived [2] 56/12 57/12
waiver [1] 56/23
walk [5] 16/10 31/17 31/24 38/2 52/25
walking [1] 55/23
Walmart [1] 42/10
want [23] 4/24 4/25 13/18 14/18 33/10 33/18 33/19 33/25 34/13 39/16 44/24 45/21 46/9 46/14 47/17 48/21 50/9 52/9 58/24 59/13 59/22 68/12 72/4
wanted [8] 5/14 13/20 38/17 47/13 47/15 49/4 49/4 68/9
wants [3] 44/25 46/2 46/9
was [85]
Washington [14] 1/7 1/17 2/4 2/9 2/13 2/22 3/22 8/21 48/15 48/17 48/20 49/15 49/24 51/11
wasn't [1] 53/6
way [19] 5/11 9/13 10/1 21/10 30/14 35/14 36/7 36/16 38/17 41/7 41/8 43/17 45/2 47/25 53/1 59/10 60/9 61/11 62/25
way that [1] 35/14
ways [6] 29/3 39/21 39/22 43/2 43/12 71/15
we [116]
we'd [1] 36/14
we'll [5] 45/20 49/6 49/7 49/8 51/6
we'll let [1] 49/7
we're [4] 23/18 35/2

W
we're... [2] 40/18 43/24
we've [5] 15/18 39/25 48/5 50/15 51/21
weaken [7] 32/20 32/24 35/13 58/12 71/24 72/4 72/10
weakened [11] 23/11 23/13 23/15 23/20 23/22 24/2 24/24 25/1 25/2 72/6 72/13
weakening [2] 22/19 58/24
weakens [1] 33/1
weeds [1] 51/9
week [1] 22/22
weigh [1] 69/6
weighs [1] 67/18
WEIL [1] 2/3
Weisbach [2] 15/19 17/20
well [11] 5/9 10/25 17/25 19/15 28/9 32/11 35/10 42/22 43/22 51/15 59/8
went [2] 28/9 49/2
were [39] 6/23 8/20 11/6 11/12 20/16 26/13 26/14 26/21 29/23 36/5 36/21 36/21 37/15 37/16 40/17 41/3 41/5 41/6 46/24 48/20 49/1 49/2 49/24 49/24 49/25 50/1 51/17 52/19 52/20 55/1 56/18 56/19 59/20 61/5 61/5 62/19 62/20 63/4 69/18
West [1] 1/20
what [67] 4/19 6/10 9/23 10/3 10/4 11/16 11/23 12/10 12/16 13/15 13/18 14/12 14/13 14/15 14/19 15/15 18/13 21/17 21/25 22/13 22/16 22/23 22/24 23/1 23/3 23/4 23/6 24/22 25/21 25/21 25/25 27/20 27/20 30/8 31/20 33/8 33/10 33/23 34/23 35/6 35/8 36/23 39/1 40/11 41/23 41/23 42/6 42/13 43/15 44/2 48/14 50/6 51/16 51/21 53/22 56/6 57/17 57/18 60/1 63/3 63/13 63/17 63/19 64/5 64/5 64/12 64/15
what is [1] 14/13
what's [4] 12/1 12/2 23/3 34/8
whatever [9] 4/13 58/24 58/24 59/14 59/14 59/15 60/21 60/22 62/8
whatsoever [3] 20/12 55/17 55/21
when [22] 6/8 9/7 12/16 17/2 17/9 17/22 20/4 20/5 26/20 30/16 31/11 35/16 39/15 39/16 42/18 53/10 54/10 60/8 60/16 60/17 61/3 63/21
where [16] 12/6 12/20 12/25 12/25 20/25 27/6 27/24 29/23 33/21 35/8 38/7 53/10 55/4 58/14 62/6 64/14
whether [32] 4/17 8/13 11/9 11/23 16/5 16/6 16/7 19/13 19/14 19/24 20/1 20/2 20/6 20/8 21/23 22/25 26/21 27/9 31/4 33/23 36/19 37/21 49/13 49/14 56/12 58/12 58/19 60/8 65/1 68/18 69/13 73/22
which [32] 5/7 8/3 13/1 16/5 18/9 19/4 19/7 21/17 25/6 26/23 27/11 27/13 28/17 28/21 29/4 35/4 36/3 39/25 44/6 44/10 44/11 45/17 47/2 48/2 54/12 58/18 58/20 62/11 65/12 70/11 70/18 70/25
while [5] 10/2 10/22 21/19 41/10 70/2
who [6] 5/3 17/11 50/1 50/3 70/6 73/22
whole [3] 10/2 17/19 20/3
whose [1] 35/22
why [23] 5/17 9/16 10/13 12/1 12/2 16/11 19/5 19/5 19/10 19/15 22/11 22/11 22/14 27/24 31/3 38/17 57/24 60/25 61/2 61/4 61/7 61/8 61/9
will [67] 3/14 3/17 3/19 4/14 4/15 4/16 4/19 4/20 4/23 5/22 6/6 6/8 9/5 12/3 12/17 16/11 18/3 18/4 18/5 18/9 18/10 18/22 19/18 24/1 24/5 24/8 24/10 27/2 32/14 33/1 35/16 38/10 38/18 41/22 41/23 43/4 43/5 43/6 44/7 45/5 45/17 49/8 51/2 51/5 52/15 52/22 54/9 56/10 58/23 65/2 65/3 65/6 65/13 65/14 65/18 65/20 67/3 69/22 69/23 69/25 70/2 70/22 71/9 71/18 72/17 73/11 74/2
William [2] 2/15 3/8
willing [1] 52/23
win [1] 33/2
winter [1] 44/1
wit [1] 43/20
withheld [1] 45/18
withhold [1] 46/5
within [1] 25/23
without [2] 61/9 69/14
witness [1] 49/12
witnesses [2] 48/22 49/3
Wolf [2] 2/6 4/5
Wolf's [1] 56/10
won't [6] 35/25 38/19 49/7 51/4 63/23 71/21
word [5] 10/10 29/6 30/7 47/2 47/16
words [7] 13/22 32/17 36/17 37/9 48/7 49/22 62/25
work [5] 7/8 44/16 54/21 54/22 57/8
worked [1] 53/1
worker [1] 63/10
workers [3] 9/24 42/8 43/5
world [1] 62/1
worried [1] 49/1
would [79]
wouldn't [5] 36/15 36/16 56/14 57/15 60/14
write [1] 65/3
written [10] 4/12 7/6 30/10 31/16 33/3 33/11 45/16 46/4 74/2 74/2
wrong [2] 23/10 51/3

Y
Yeah [1] 38/18
year [20] 3/3 18/24 19/9 28/13 28/13 39/6 39/6 41/25 41/25 42/1 42/15 42/15 42/16 43/3 46/17 63/7 64/16 64/17 71/5 72/5
years [7] 28/12 39/2 42/7 45/6 45/9 60/23 72/11
yes [21] 3/17 10/22 12/19 14/8 14/20 18/24 20/22 31/16 31/25 38/13 38/21 44/5 44/13 46/4 47/5 47/8 49/21 52/5 55/12 55/14 61/23
yet [2] 27/15 33/25
York [1] 3/24
you [170]
you'd [1] 4/14
you'll [2] 44/7 54/13
you're [2] 17/6 41/10
you've [2] 5/22 30/9
your [128]
yourselves [1] 3/9

Z
zero [1] 52/3
Zweben [2] 1/15 3/14